1985 Edition

Supersedes 1984 Edition

Federal CRIMINAL CODE and RULES

FEDERAL RULES:

CRIMINAL PROCEDURE
HABEAS CORPUS RULES—28 §§ 2254 & 2255
MISDEMEANOR TRIALS BEFORE U.S. MAGISTRATES
EVIDENCE
APPELLATE PROCEDURE
SUPREME COURT RULES

TITLE 18—CRIMES AND CRIMINAL PROCEDURE
TITLE 21—Chapter 13–DRUG ABUSE PREVENTION AND CONTROL

ADVISORY COMMITTEE NOTES ON RULES
REVISERS' NOTES ON TITLE 18

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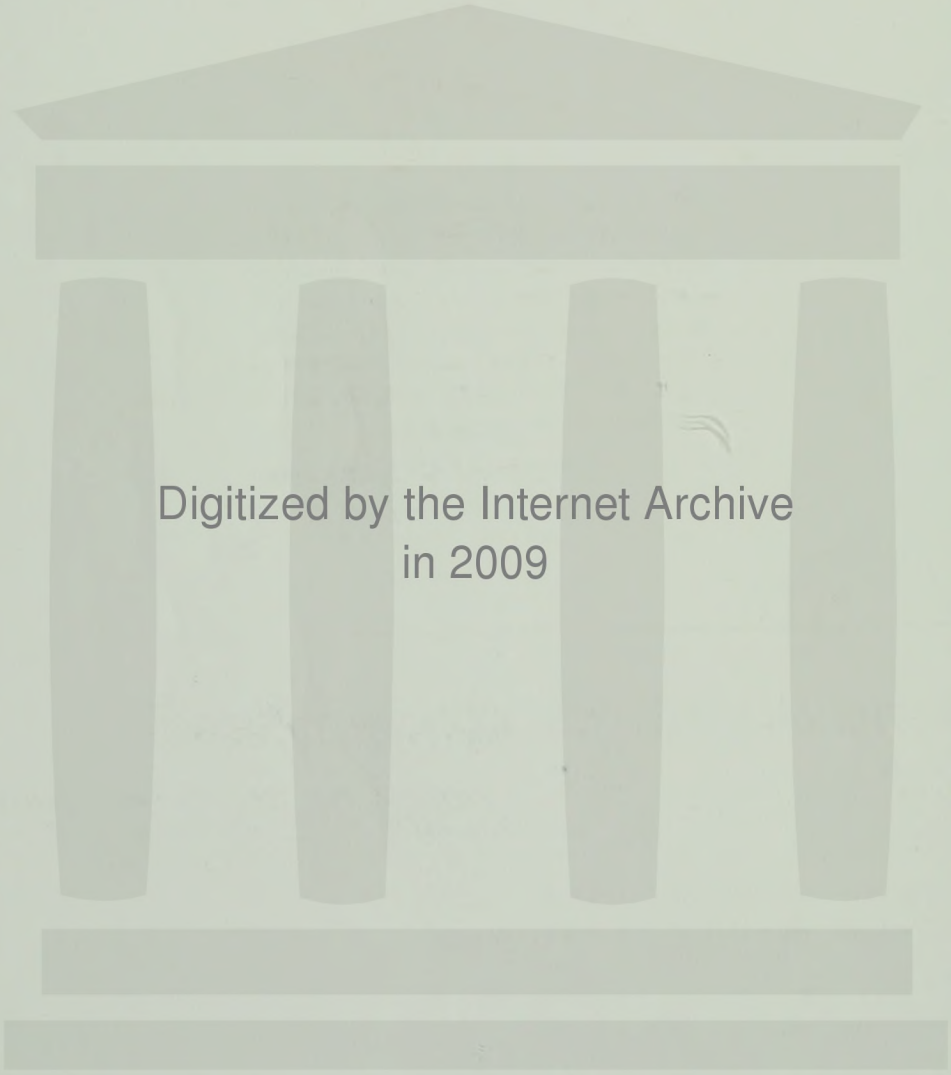
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1985 EDITION

FEDERAL CRIMINAL CODE and RULES

as amended to January 1, 1985

Rules of Criminal Procedure
Rules Governing Title 28 section 2254 Cases
Rules Governing Title 28 section 2255 Proceedings
Rules for Trial of Misdemeanors Before U.S. Magistrates
Rules of Evidence
Rules of Appellate Procedure
Rules of Supreme Court of the United States

Title 18, Crimes and Criminal Procedure
App. I—Act June 25, 1948, c. 645, §§ 2 to 21
App. II—Unlawful Possession or Receipt of Firearms
App. III—Interstate Agreement on Detainers
App. IV—Classified Information Procedures Act
App. V—Extradition Treaties Table
Title 21, chapter 13, Drug Abuse Prevention and Control

Consolidated Index

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PREFACE

This convenient reference Pamphlet, in form suitable for courtroom and office use, contains the text of the—

Federal Rules of Criminal Procedure, with amendments to January 1, 1985.

Rules Governing Cases under Sections 2254 and 2255 of Title 28, United States Code, with amendments to January 1, 1985.

Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, effective June 1, 1980.

Federal Rules of Evidence, with amendments to January 1, 1985.

Federal Rules of Appellate Procedure, with amendments to January 1, 1985.

Rules of the Supreme Court of the United States, with amendments to January 1, 1985.

Criminal Code, Title 18, United States Code, with amendments to January 1, 1985.

Title 21 U.S. Code, Chapter 13, Drug Abuse Prevention and Control, with amendments to January 1, 1985.

Following the text of Title 18, the Act of June 25, 1948, c. 645, §§ 2 to 21, are set out in Appendix I: the Unlawful Possession or Receipt of Firearms provisions from Pub.L. 90–351, title VII, §§ 1201 to 1203, are set out in Appendix II; the Interstate Agreement on Detainers from Pub.L. 91–538 is set out in Appendix III; the Classified Information Procedures Act from Pub.L. 96–456 is set out in Appendix IV; and a table of Extradition Treaties is set out in Appendix V.

As a regular feature in this Pamphlet, the Advisory Committee Notes for the rules have been set out immediately following each rule, and the Revisers' notes are set out under sections of Title 18.

The several Committees of Rules of Practice and Procedure of the Judicial Conference of the United States are listed herein for the information of the Bench and Bar.

A combined Time Table for Lawyers under the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Rules of the Supreme Court also appears herein. This Table indicates the time for each of the various procedural steps required by the Rules.

A detailed, consolidated Index covering the Federal Rules of Criminal and Appellate Procedure, the Rules of the Supreme

Court of the United States, the Federal Rules of Evidence, the Rules of Procedure for the Trial of Misdemeanors before U.S. Magistrates, the Rules Governing Cases under Sections 2254 and 2255 of Title 28, the Criminal Code, in Title 18, and the laws on Drug Abuse Prevention and Control appears in the back of this Pamphlet.

THE PUBLISHER

February, 1985

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Committees on Rules
OF
PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

Announcement of the Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C.

April 4, 1960

The Chief Justice of the United States announced today the appointment of six nationally-organized committees of judges, lawyers, and legal scholars whose job it will be to study and to recommend to the Supreme Court improvement in the rules of practice and procedure in the Federal courts.

The Committees were appointed pursuant to an Act passed by Congress [P.L. 85–513, 72 Stat. 356] July 11, 1958 [28 U.S. C.A. § 331], authorizing the Judicial Conference of the United States, of which the Chief Justice is Chairman, to make a continuous study of the Federal rules.

"The rules of court," Chief Justice Earl Warren said, "are the most important tools of the courtroom lawyer. So long as we have the inevitable changes in our social, economic and political lives, the demand for amendments in the rules, and also for new rules, by which we resolve conflicts in the courts is equally inevitable.

"It is essential that our rules of court be up-to-date and all amendments should be studied and recommended by committees with as broad an outlook and base as possible. Accordingly these committees include representatives of the bar, the judiciary and the legal scholars and for their ideas they will draw upon the bench and bar of the country as a whole and particularly the Judicial Conferences in all eleven of the Federal circuits.

"Experience has shown that in order to promote simplicity in procedure, the just determination of litigation and the elimination of unjustifiable expense and delay, it is essential that the

operation and effect of the Federal rules of practice and procedure should be the subject of continuous study. Such study is the objective of the committees being announced today, and every judge, practicing lawyer, and legal scholar will be afforded the opportunity to participate—to state his views—with assurances that those views will be given consideration."

The Committees, and the Committee Chairmen, are:

Standing Committee on Rules of Practice and Procedure

ALBERT B. MARIS, *Chairman*

Advisory Committee on Civil Rules

DEAN ACHESON, *Chairman*

Advisory Committee on Criminal Rules

JOHN C. PICKETT, *Chairman*

Advisory Committee on Admiralty Rules

WALTER L. POPE, *Chairman*

Advisory Committee on General Orders in Bankruptcy

PHILLIP FORMAN, *Chairman*

Advisory Committee on Appellate Rules

E. BARRETT PRETTYMAN, *Chairman*

The Advisory Committees will conduct the basic studies and develop reports and recommendations in the respective fields. These will be forwarded to the standing Committee on Rules of Practice and Procedure which, in turn, will report to the Judicial Conference of the United States. If approved, the Judicial Conference will formally forward the report and recommendations to the Supreme Court of the United States. The Supreme Court will approve, modify, or disapprove of the changes in the Federal rules, and those adopted will be transmitted by the Supreme Court to the Congress. In such cases, the rules automatically became law in ninety days unless the Congress acts adversely.

Memberships on the Committees are for 2 and 4 year terms, with each member entitled to one additional term. This will have the effect of bringing new ideas to the Committees and keeping pace with developments in the law.

Headquarters Secretariat for the rules study will be in the Administrative Office of the United States Courts, Supreme Court Building, Washington, D.C., under the direction of Warren Olney III, Director. * * *.

SECRETARIAT

Administrative Office of the United States Courts

Washington, D.C. 20544

WILLIAM E. FOLEY, *Director*

JOSEPH F. SPANIOL, JR., *Deputy Director*

Special Notice

Inquiries and correspondence with reference to the Rules of Practice and Procedure may be directed to—

JOSEPH F. SPANIOL, JR., *Secretary*

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Washington, D.C. 20544

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PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice and procedure and amendments to existing rules.

Part I—Advisory Committees

1. Functions

   Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. Each Advisory Committee shall submit to the Standing Committee its recommendations for rules changes.

2. Suggestions and Recommendations

   Suggestions and recommendations with respect to the rules should be sent to the Secretary to the Standing Committee, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall acknowledge in writing every written suggestion or recommendation so received and refer all suggestions and recommendations to the appropriate Advisory Committee. The Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

   a. An Advisory Committee shall meet at such times and places as the Chairman may authorize.

   b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

3. Drafting Rules Changes—Continued

   c. The Advisory Committee shall then consider the draft proposed new rules and rules amendments, together with the Committee Notes, make revisions therein, and submit them to the Standing Committee, or its Chairman, for approval of publication.

4. Publication and Public Hearings

   a. When publication is approved, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally, for comment to be made to the Advisory Committee. Distribution shall be as wide as practicable and shall include the Chief Justice of the highest court in each State and all individuals or organizations that request copies of proposed rules changes. The Secretary shall also send copies to appropriate legal publishing firms with a request that the proposed rules changes be included in their publications.

   b. In the light of the time required to permit full consideration of proposed rule changes by bar associations, circuit judicial conferences and other interested groups, a period of at least six months shall normally be allowed for public comment.

   c. An Advisory Committee shall normally conduct public hearings on all proposed rules changes after adequate notice and at such times and places as shall be determined by the Chairman. The proceedings shall be recorded and a transcript shall be prepared for the Committee's use. The transcript shall be available to the public at the Administrative Office of the United States Courts.

   d. Exceptions to the time for comment, public hearings, and publication requirements of these procedures may be granted by the Standing Committee, or its Chairman.

5. Subsequent Procedures

   a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public comment may be provided.

   b. The Secretary to the Standing Committee, in consultation with the Chairman of the Advisory Committee,

5. Subsequent Procedures—Continued

shall advise every person who has commented on a proposed rules change of the Advisory Committee action thereon.

c. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.

b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II—Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

   a. The Standing Committee shall meet at such times and places as the Chairman may authorize.

   b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.

   c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

   d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

   a. The Secretary shall prepare minutes of all Standing Committee meetings.

   b. The records of the Standing Committee shall consist of the minutes of Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

   c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

*

TIME TABLE FOR LAWYERS IN FEDERAL CRIMINAL CASES

Revised to January 1, 1985

This table indicates the time for the various steps in a criminal action as provided by the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, the 1980 Revised Rules of the Supreme Court, and, where applicable, Titles 18 and 28 of the United States Code. Most of these time limitations may be enlarged by the court under the conditions and with the exceptions indicated under "Enlargement of time" in the table. Citations are to the supporting Rules and are in the form "Crim.R. —" for the Rules of Criminal Procedure and "App.R. —" for the Rules of Appellate Procedure. Citations to the 1980 Revised Rules of the Supreme Court are not abbreviated.

ACQUITTAL

Motion for judgment of	After evidence on either side is closed. If motion is made at close of all the evidence, the court may reserve decision and decide motion either before verdict is returned or after jury returns verdict of guilty or is discharged without verdict. Motion may be made or renewed within 7 days after discharge of jury or within such further time as court may fix during the 7-day period. Crim.R. 29.

ALIBI

Notice by defendant	Upon written demand of government, defendant to serve within 10 days or at such different time as court directs. Crim.R. 12.1(a). Exceptions for good cause shown. Crim.R. 12.1(e).
Disclosure by government	Within 10 days after service of defendant's notice of alibi, government to serve written notice stating names and addresses of rebuttal witnesses. Crim.R. 12.1(b). Exceptions for good cause shown. Crim.R. 12.1(e).
Continuing duty to disclose	Either party to promptly notify of existence and identity of additional witness learned of prior to or during trial whose identity, if known, should have been included in information furnished under Crim.R. 12.1(a) or

ALIBI—Cont'd	(b). Crim.R. 12.1(c). Exceptions for good cause shown. Crim.R. 12.1(e).
ALLOCUTION	Before sentence is imposed, court to address defendant personally and ask if he wishes to make statement or to present information in mitigation. Crim.R. 32(a)(1).
APPEAL	See, also, "Certiorari".
Notification of right	After imposing sentence following plea of guilty or nolo contendere. Crim.R. 32(a).
	After imposing sentence in case which has gone to trial on plea of not guilty. Crim.R. 32(a)(2).
By defendant	Within 10 days after entry of judgment or order appealed from. If a timely motion in arrest of judgment or for new trial on any ground other than newly discovered evidence has been made, appeal may be taken within 10 days after entry of order denying the motion; motion for new trial based on newly discovered evidence will similarly extend time if made before or written 10 days after entry of judgment. Time may be extended for not more than 30 additional days on a showing of excusable neglect. App.R. 4(b).
By government	When authorized by statute, within 30 days after entry of judgment or order appealed from. Time may be extended for not more than 30 additional days on a showing of excusable neglect. App.R. 4(b).
To Supreme Court	See 28 U.S.C.A. Rules, 1980 Revised Rules of the Supreme Court, Rule 11.
Record (appellant)	Within 10 days after filing notice of appeal: Appellant to place written order for transcript and file copy of order with clerk; if none to be ordered, file a certificate to that effect; unless entire transcript to be included, file a statement of issues and serve appellee a copy of order or certificate and of statement. App.R. 10(b).
Record (appellee)	Within 10 days after service of appellant's order or certificate or statement, appellee to file and serve on appellant a designation of additional parts of transcript to be included. Unless within 10 days after designation appellant has ordered such parts and so notified appellee, appellee may within following 10 days either order the parts or move in

APPEAL—Cont'd	
	district court for order requiring appellant to do so. App.R. 10(b).
Record (costs)	At time of ordering, party to make satisfactory arrangements with reporter for payment of cost of transcript. App.R. 10(b)(4).
Record (reporter)	If transcript cannot be completed within 30 days of receipt of order, reporter shall request extension of time from clerk of court of appeals. App.R. 11(b).
Setting appeal for argument	The clerk will advise the parties. A request for postponement of argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing. App.R. 34(b).
APPEARANCE	
Before magistrate	Without unnecessary delay after an arrest without warrant or an arrest under a warrant issued on a complaint. Crim.R. 5(a).
ARREST of judgment	
Motion in	Within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 7-day period. Crim.R. 34.
ARRESTED persons	See, also, "CUSTODY".
Under warrant upon complaint or without warrant	To be taken without unnecessary delay before nearest federal magistrate, or, if none available, before state or local judicial officer authorized by 18 U.S.C.A. § 3041. Crim.R. 5(a). If person arrested without warrant is brought before magistrate, complaint shall be filed forthwith. Crim.R. 5(a).
Under warrant upon indictment or information	To be brought promptly before the court or before a United States magistrate. Crim.R. 9(c)(1).
Commitment to another district	Person arrested (1) in a district other than that in which the offense is alleged to have been committed, or (2) for a probation violation in a district other than the district of supervision, or (3) on a warrant (issued for failure to appear pursuant to subpoena or terms of release) in a district other than that in which the warrant was issued, shall be taken without unnecessary delay before the nearest available federal magistrate. Crim.R. 40.
BILL of particulars	Before arraignment. Crim.R. 7(f).

BILL of particulars— Cont'd	
Amendment	At any time subject to such conditions as justice requires. Crim.R. 7(f).
Motion for	Before arraignment or within 10 days after arraignment or at such later time before as court may permit. Crim.R. 7(f).
CERTIORARI	
Petition for writ	See 28 U.S.C.A. Rules, 1980 Revised Rules of the Supreme Court, Rule 20.
CHANGE of venue	See "Transfer".
CLERICAL mistakes	Corrected at any time and after such notice, if any, as the court orders. Crim.R. 36.
CLERK'S office	Open during business hours on all days except Saturdays, Sundays, legal holidays and on days on which weather or other conditions have made office of clerk inaccessible. Crim.R. 45(a), 56; App.R. 45(a).
COMMITMENT to another district	Person arrested (1) in a district other than that in which the offense is alleged to have been committed, or (2) for a probation violation in a district other than the district of supervision, or (3) on a warrant (issued for failure to appear pursuant to subpoena or terms of release) in a district other than that in which the warrant was issued, shall be taken without unnecessary delay before the nearest available federal magistrate. Crim.R. 40.
COMPLAINT	When person arrested without a warrant is brought before a magistrate, a complaint must be filed forthwith. Crim.R. 5(a).
COMPUTATION of time	Exclude day from which period runs and include last day of period unless a Saturday, Sunday, or legal holiday, in which case period runs until end of the next day which is neither a Saturday, Sunday, nor legal holiday. Crim.R. 45(a); App.R. 26(a).
	Exclude day from which period runs and include last day of period unless weather or other conditions make clerk's office inaccessible, in which case period runs until end of next day which is neither Saturday, Sunday nor legal holiday. Crim.R. 45(a).

COMPUTATION of time— Cont'd	
	Intermediate Saturdays, Sundays, and legal holidays are excluded if the period is less than 7 days. Crim.R. 45(a); App.R. 26(a).
	Service by mail adds 3 days to a period computed from time of such service. Crim. R. 45(e); App.R. 26(c).
	Supreme Court matters, see 28 U.S.C.A. Rules, 1980 Revised Rules of the Supreme Court, Rule 29.
COUNSEL	
Joint representation of defendants jointly charged or joined for trial	Court shall promptly inquire into such joint representation and shall personally advise each defendant of right to effective assistance of counsel, including separate representation. Crim.R. 44(c).
COURTS	Always open except when weather or other conditions make court inaccessible. Crim. R. 45(a).
	District courts always open. Crim.R. 56.
CUSTODY	See, also, "ARRESTED PERSONS".
Release prior to trial	In accordance with 18 U.S.C.A. §§ 3142 and 3144. Crim.R. 46(a).
Release during trial	Person released before trial to continue on release during trial unless court determines otherwise. Crim.R. 46(b).
Release pending sentence or pending notice of appeal	In accordance with 18 U.S.C.A. § 3143. Crim.R. 46(c).
Witness	Witness who has been detained pursuant to 18 U.S.C.A. § 3144 and whose deposition is taken pursuant to Crim.R. 15(a) may be discharged by court after his deposition has been subscribed. Crim.R. 15(a).
Reports	Attorney for government shall make biweekly report to court listing defendants and witnesses held in excess of 10 days and shall make statement of reasons why each witness should not be released and why each defendant is still in custody. Crim.R. 46(g).
DEFENSES and objections	
Raising of motion	Time for making pretrial motions or requests (and, if required, a later date of hearing) may be set by court at time of

DEFENSES and objections—Cont'd	
	arraignment or as soon thereafter as practicable. Crim.R. 12(c). Defenses and objections which may be, and those which must be, raised before trial. Crim.R. 12(b).
Ruling on motion	Motion made before trial must be determined before trial unless court orders that it be deferred for determination at the trial of the general issue or until after verdict. Crim.R. 12(e).
Alibi	See "ALIBI".
Insanity	Written notice of intention to rely on defense of insanity to attorney for government and copy filed with clerk within time provided for filing of pretrial motions or at such time as court directs. Court may for cause shown allow late filing or grant additional time or make other order as appropriate. Crim.R. 12.2(a).
Mental condition	Written notice of intention to introduce expert testimony to attorney for government and copy filed with clerk within time provided for filing of pretrial motions or at such later time as court directs. Court may for cause shown allow late filing or grant additional time or make other order as appropriate. Crim.R. 12.2(b).
DEPOSITIONS	
Notice of taking	Reasonable written notice. The court for cause shown may extend or shorten the time. Crim.R. 15(b).
Taking of	By order of court whenever due to exceptional circumstances of the case it is in interest of justice that testimony of prospective witness of party be taken and preserved for use at trial upon motion of such party. Crim.R. 15(a).
DISCOVERY or inspection	
Motion	Motion for discovery under Crim.R. 16 must be raised prior to trial. Crim.R. 12(b).
Notice by government of intention to use evidence	At arraignment or as soon thereafter as practicable, defendant may request notice of government's intention to use (in evidence-in-chief at trial) any evidence defendant may (under Crim.R. 16) be entitled to discover. Crim.R. 12(d).

DISCOVERY or inspection—Cont'd	
Statements or report by government witnesses	Shall not be subject of subpena, discovery, or inspection until witness has testified on direct examination in the trial of the case. 18 U.S.C.A. § 3500(a).
Continuing duty to disclose	Party who, prior to or during trial, discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection shall promptly notify other party or his attorney or the court. Crim.R. 16.
DISMISSAL	If there is unnecessary delay in presenting charge to grand jury or in filing an information against defendant held to answer to district court or in bringing defendant to trial, the court may dismiss the indictment, information, or complaint. Crim.R. 48(b).
ENLARGEMENT of time	Extension of time when day on which weather or other conditions have made office of clerk inaccessible. Crim.R. 45(a).
Criminal procedure	When act required or allowed to be done at or within specified time, court for cause shown may (1) with or without motion or notice, order period enlarged if request is made before expiration of period originally prescribed or as extended by previous order or (2) upon motion made after expiration of specified period permit act to be done if failure to act was result of excusable neglect. Crim.R. 45(b). See, however, "Motion for judgment of acquittal", "Motion for new trial", "Motion in arrest of judgment," and "Reduction of sentence or correction of sentence imposed in illegal manner", this heading.
Appeal	Extension of time for filing notice of appeal for period not to exceed 30 days from expiration of time otherwise prescribed by App. R. 4(b), upon showing of excusable neglect, before or after time has expired. App.R. 4(b). In cases on appeal, for good cause shown, court may enlarge time prescribed by rules of appellate procedure or by its order for doing any act, or may permit an act to be done after expiration of such time. Court may not, however, enlarge time for filing notice of appeal (but see provision in App.R. 4(b) for extension of time), petition for allowance, or petition for permission to appeal. App.R. 26(b).

ENLARGEMENT of time—Cont'd	
Supreme Court	See 28 U.S.C.A. Rules, 1980 Revised Rules of the Supreme Court, Rule 29.
Motion for judgment of acquittal	No enlargement of the 7-day period except as fixed by the court within that time. Crim.R. 29, 45(b).
Motion for new trial	No enlargement of the 7-day period except as fixed by the court within that time. Crim.R. 33, 45(b).
Motion in arrest of judgment	No enlargement of the 7-day period except as fixed by the court within that time. Crim.R. 34, 45(b).
Reduction of sentence or correction of sentence imposed in illegal manner	No enlargement. Crim.R. 35, 45(b).
EVIDENCE	
Suppression	Motion must be raised prior to trial. Crim. R. 12(b).
Notice by government of intention to use evidence	At arraignment or as soon thereafter as practicable, either (1) at discretion of government respecting specified evidence or (2) at request of defendant respecting intention to use (in evidence-in-chief at trial) any evidence defendant may (under Crim.R. 16) be entitled to discover. Crim.R. 12(d).
Notice by defendant of intention to introduce expert testimony of mental condition	Written notice to attorney for government and copy filed with clerk within time provided for filing of pretrial motions or at such time as court directs. Court may for cause shown allow late filing or grant additional time or make order as appropriate. Crim.R. 12.2(b).
EXECUTION, stay of	Stay of execution pending appeal. Crim.R. 38(a).
FOREIGN law	Reasonable written notice required of party intending to raise an issue concerning the law of a foreign country. Crim.R. 26.1.
GRAND jury	
Challenges	Challenges to the array or to individual jurors must be made before administration of the oath to the jurors. (If not previously determined upon challenge, objections may be made by motion to dismiss indictment.) Crim.R. 6(b). In any event challenge must be made before the voir dire examination begins, or within 7 days after the grounds

GRAND jury—Cont'd	
	of challenge are discovered or could have been discovered, whichever is earlier. 28 U.S.C.A. § 1867(a), (b).
Excuse of juror	At any time for cause shown court may excuse a juror either temporarily or permanently. Crim.R. 6(g).
Summoning	Grand juries must be summoned at such times as the public interest requires. Crim. R. 6(a).
Tenure	Until discharged by court but not more than 18 months unless court extends service for period of 6 months or less when the extension is in the public interest. Crim.R. 6(g).
HOLIDAYS	Exclusion in computation of time. Crim.R. 45(a); App.R. 26(a).
INDICTMENT	
Defects	Defenses and objections based on defects (other than failure to show jurisdiction in the court or to charge offense which objections shall be noticed at any time during pendency of proceedings) must be raised prior to trial. Crim.R. 12(b).
Delivery of copy to defendant	Before he is called upon to plead. Crim.R. 10.
Failure to find	If complaint or information is pending, failure to find indictment must be reported to magistrate forthwith. Crim.R. 6(f).
Sealing and secrecy	Federal magistrate to whom an indictment is returned may direct that indictment shall be kept secret until defendant is in custody or has been released pending trial; clerk thereupon to seal and no person to disclose except when necessary for issuance and execution of warrant or summons. Crim.R. 6(e)(4).
INFORMATION	
Amendment	At any time before verdict or finding if no additional or different offense is charged and substantial rights are not prejudiced. Crim.R. 7(e).
Defects	Defenses and objections based on defects (other than failure to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during pendency of proceedings) must be raised prior to trial. Crim.R. 12(b).

INFORMATION—Cont'd	
Delivery of copy to defendant	Before he is called upon to plead. Crim.R. 10.
INSTRUCTIONS	
Action on requests	Court must inform counsel of its proposed action prior to arguments to jury, but it instructs jury after arguments are completed. Crim.R. 30.
Filing requests for	At close of evidence or at such earlier time during trial as court reasonably directs. Copies must be furnished adverse parties at same time. Crim.R. 30.
Objections	Before jury retires to consider verdict. Crim.R. 30.
JUDGE, disability of	Any other judge regularly sitting in or assigned to the court may (1) during trial, upon certifying that he has familiarized himself with record of trial, proceed with and finish trial and (2) after verdict or finding of guilt, perform duties of judge before whom defendant has been tried. Crim.R. 25.
JUDGMENT of acquittal	
Motion for	After evidence on either side is closed. If motion is made at close of all the evidence, court may reserve decision and decide motion either before verdict is returned or after jury returns verdict of guilty or is discharged without verdict. Motion may be made or renewed within 7 days after discharge of jury or within such further time as court may fix during the 7-day period. Crim.R. 29.
JURY	See, also, "Grand jury".
Alternate jurors	Replace jurors who are found to be unable or disqualified prior to the time jury retires to consider its verdict. Alternate jurors who do not replace regular jurors are discharged after that time. Crim.R. 24(c).
Array, challenge of	Must be made before voir dire examination begins, or within 7 days after the grounds for the challenge are discovered or could have been discovered, whichever is earlier. 28 U.S.C.A. § 1867(a), (b).
Less than 12	By stipulation in writing at any time before verdict. Even absent stipulation, if court finds it necessary to excuse juror for just cause after jury has returned, a valid ver-

JURY—Cont'd	
	dict may be returned by remaining 11 jurors in discretion of court. Crim.R. 23(b).
Poll of jury	When verdict is returned and before it is recorded, at request of any party or on court's own motion. Crim.R. 31(d).
MAIL	Service by mail adds 3 days to a period computed from the time of such service. Crim.R. 45(e); App.R. 26(c).
MENTAL condition (defense)	Written notice and copy filed with clerk within time provided for filing of pretrial motions or at such later time as court directs. Court may for cause shown allow late filing or grant additional time or make other order as appropriate. Crim.R. 12.2(a), (b).
MOTIONS	
Service of	Written motions, supporting affidavits, and notice of hearing must be served not later than 5 days before time specified for hearing unless a different period is fixed by rule or order of court. For cause shown, such an order may be made on ex parte application. Crim.R. 45(d).
	Opposing affidavits may be served not less than 1 day before hearing, except as permitted by court. Crim.R. 45(d).
NEW trial	
Motion generally	Within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period. Crim.R. 33.
Newly discovered evidence	Before or within two years after final judgment. If appeal is pending motion may be granted only on remand of case. Crim.R. 33.
OBJECTIONS	See "Defenses and objections."
PLEA of guilty or nolo contendere	
Agreement procedure	Court to require disclosure of agreement at time plea is offered. Crim.R. 11(e)(2). Except for good cause shown, notice to court of existence of agreement to be given at arraignment or at such other time prior to trial as fixed by court. Crim.R. 11(e)(5).

PLEA of guilty or nolo contendere—Cont'd	
Appeal	Notification of right following sentence. Crim.R. 32.
Motion to withdraw	If motion is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C.A. § 4205(c), court may permit withdrawal upon showing of any fair and just reason. At any later time, only on direct appeal or by motion under 28 U.S.C.A. § 2255. Crim.R. 32(d).
PRELIMINARY examination	
Defendant in custody	Preliminary examination within a reasonable time but not later than 10 days following initial appearance. Crim.R. 5. See, also, 18 U.S.C.A. § 3060.
Defendant not in custody	Preliminary examination within a reasonable time but not later than 20 days following initial appearance. Crim.R. 5. See, also, 18 U.S.C.A. § 3060.
Extension	With consent of defendant, one or more times, by federal magistrate, upon showing of good cause, taking into account public interest in prompt disposition. Without consent of defendant, by judge of the United States only upon showing that extraordinary circumstances exist and that delay is indispensable to interests of justice. Crim. R. 5. See, also, 18 U.S.C.A. § 3060(c).
No examination	Preliminary examination shall not be held if defendant is indicted or information against him is filed in district court before date set for preliminary examination. Crim.R. 5. See, also, 18 U.S.C.A. § 3060(e).
PRESENTENCE investigation and report	Before imposition of sentence or granting of probation unless court otherwise directs. At reasonable time before imposing sentence, court to permit defendant and his counsel to read report. Crim.R. 32(c).
PRETRIAL conference	At any time after the filing of the indictment or information. Crim.R. 17.1.
PROBATION	
Hearings relating to revocation	Preliminary hearing—Prompt, whenever probationer held in custody on ground that

PROBATION—Cont'd	
	he has violated condition of probation. Crim.R. 32.1(a)(1).
	Revocation hearing—Unless waived, within a reasonable time. Crim.R. 32.1(a)(2).
REMOVAL proceedings	See "Commitment to Another District".
SATURDAYS	Exclusion in computation of time. Crim.R. 45(a); App.R. 26(a).
SEARCH warrant	
Service	Search warrant must be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. Crim. R. 41(c).
Execution and return	Must be executed within the time specified in the warrant, which time is not to exceed 10 days. Crim.R. 41(c). Must be returned promptly, accompanied by written inventory. Crim.R. 41(d).
SENTENCE	See, also, "PRESENTENCE investigation and report".
Pre-imposition remarks of counsel and statement by defendant	Before sentence is imposed: counsel to have opportunity to speak on behalf of defendant; court to address defendant personally and ask if he wishes to make statement or present information in mitigation; government to have equivalent opportunity to speak. Crim.R. 32(a).
Notification of right to appeal	After imposing sentence following plea of guilty or nolo contendere. Crim.R. 32(a).
	After imposing sentence in case which has gone to trial on plea of not guilty. Crim.R. 32(a)(2).
Correction	Court may correct illegal sentence at any time and may correct a sentence imposed in an illegal manner within time provided for reduction of sentence (see "Reduction", post, this heading). Crim.R. 35(a).
Imposition	Must be imposed without unreasonable delay. Crim.R. 32(a).
Reduction	Within 120 days after sentence is imposed, or probation is revoked, or within 120 days after receipt of mandate issued upon affirmance of judgment or dismissal of appeal, or within 120 days after entry of Supreme Court's order or judgment denying review of, or having effect of upholding,

SENTENCE—Cont'd	
	the conviction or probation revocation. Crim.R. 35(b).
Vacation, setting aside, or correction, motion for	At any time. 28 U.S.C.A. § 2255.
SEVERANCE	Motion for severance of charges or defendants under Crim.R. 14 must be raised prior to trial. Crim.R. 12(b).
SUBPOENA	Court may direct that books, papers, documents, or objects designated in subpoena be produced before court prior to trial or prior to time they are to be offered in evidence and may upon their production permit them to be inspected by parties or their attorneys. Crim.R. 17(c).
SUMMONS	
Reissue	At request of government attorney made at any time while complaint, indictment, or information is pending, if summons was returned unserved. Crim.R. 4(d)(4), 9(c)(2).
Return	On or before the return day. Crim.R. 4(d)(4), 9(c)(2).
SUNDAYS	Exclusion in computation of time. Crim.R. 45(a); App.R. 26(a).
TERM of court	Terms of court have been abolished. 28 U.S.C.A. § 138.
TRANSFER	
Motion for	At or before arraignment or at such other time as the court or the rules may prescribe. Crim.R. 22.
VERDICT, return of	In case of more than one defendant, jury may return verdicts with respect to the one or more as to whom it has agreed at any time during its deliberations. Crim.R. 31(b).
WARRANT (arrest)	See, also, "ARRESTED PERSONS".
Reissue	At request of government attorney made at any time while complaint, indictment, or information is pending, if warrant was returned unexecuted and not cancelled. Crim.R. 4(d)(4), 9(c)(2).

WARRANT (arrest)—	
Cont'd	
Showing to defendant	Officer who does not have warrant in his possession at time of arrest must show it to defendant as soon as possible upon request. Crim.R. 4(d)(3), 9(c)(1).

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FEDERAL
RULES OF CRIMINAL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

As Amended to January 1, 1985

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Amendment of Analysis

Pub.L. 98–473, Title II, §§ 215(g), 235, Oct. 12, 1984, 98 Stat. 2017, 2031, provided that, effective Nov. 1, 1986, the analysis of rules preceding rule 1 is amended as follows:

(1) The item relating to Rule 35 is amended to read as follows:

"35. Correction of Sentence.

"(a) Correction of a sentence on remand.

"(b) Correction of a sentence for changed circumstances.".

(2) The item relating to Rule 38 is amended to read as follows:

"38. Stay of Execution.

"(a) Death.

"(b) Imprisonment.

"(c) Fine.

"(d) Probation.

"(e) Criminal forfeiture, notice to victims, and restitution.

"(f) Disabilities.".

ORDERS OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES

ORDER OF DECEMBER 26, 1944

It is ordered that Rules of Criminal Procedure for the District Courts of the United States governing proceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688, 18 U.S.C.A. § 687. And the Chief Justice is authorized and directed to transmit the Rules as prescribed to the Attorney General and to request him, as provided in that Act, to report these Rules to the Congress at the beginning of the regular session in January 1945.

Mr. Justice Black states that he does not approve of the adoption of the Rules.

Mr. Justice Frankfurter does not join in the Court's action for reasons stated in a memorandum opinion.

MR. JUSTICE FRANKFURTER:

That the federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century and a quarter (*Wayman* v. *Southard*, 10 Wheat. 1, 6 L.Ed. 253). And experience proves that justice profits if the responsibility for such rule making be vested in a small, standing rule-making body rather than be left to legislation generated by particular controversies. These views make me regret all the more not to be able to join my brethren in the adoption of the Rules of Criminal Procedure of the District Courts of the United States.

By withholding approval of the adoption of the rules I do not imply disapproval. I express no opinion on their merits. With all respect to contrary views, I believe that this Court is not an appropriate agency for formulating the rules of criminal procedure for the district courts.

From the beginning of the nation down to the Evarts Act of 1891, 26 Stat. 826, though less and less after the Civil War, the members of this Court rode circuit. They thus had intimate, first-hand experience with the duties and demands of trial courts. For the last fifty years the Justices have become necessarily removed from direct, day-by-day contact with trials in the district courts. To that extent they are largely denied the first-hand opportunities for realizing vividly what rules of procedure are best calculated to promote the largest measure of justice. These considerations are especially relevant to the formulation of rules for the conduct of criminal trials. These closely concern the public security as well as the liberties of citizens.

And this leads to another strong reason for not charging this Court with the duty of approving in advance a code of criminal procedure. Such a code can hardly escape provisions in which lurk serious questions for future adjudication by this Court. Every lawyer knows the difference between passing on a question concretely raised by specific litigation and the formulation of abstract rules, however fully considered by members of the lower courts and the bar. I deem it unwise to prejudge, however unintentionally, questions that may in due course of litigation come before this Court by having this Court lay down rules in the abstract rather than deciding issues coming here with the impact of actuality and duly contested.

And there is one more important consideration. The business of this Court is increasing in volume and complexity. In the years ahead the number of cases will not decrease nor their difficulties lessen. The jurisdiction of this Court has already been cut almost to the bone. If the Court is not to be swamped, as it has been in the past, and is to do its best work, it must exercise rigorously its discretionary jurisdiction. Every additional duty, such as responsibility for fashioning progressive codes of procedure and keeping them current, makes inroads upon the discharge of functions which no one else can exercise.

Brief as is this statement, it can leave no room for doubt that the reasons which have constrained me to withhold approval of adoption of the rules completely transcend judgment of their merits.

ORDER OF FEBRUARY 8, 1946

It is ordered on this 8th day of February, 1946 that the annexed Rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or pleas of guilty, be prescribed pursuant to the Act of February 24, 1933, c. 119 as amended [47 Stat. 904, U.S.Code Title 18 § 3772] for the District Courts of the United States, the United States Circuit Courts of Appeals, the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States, and that said rules shall become effective on the 21st day of March, 1946.

It is further ordered that these Rules and the Rules heretofore promulgated by order dated December 26, 1944 governing proceedings prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, shall be consecutively numbered as indicated and shall be known as the Federal Rules of Criminal Procedure.

ORDER OF DECEMBER 27, 1948

The following order was adopted by the Supreme Court on December 27, 1948.

1. That the title of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

Rules of Criminal Procedure for the United States District Courts.

2. That Rules 17(e)(2), 41(b)(3), 41(g), 54(a)(1), 54(b), 54(c), 55, 56, and Rule 57(a), of the Federal Rules of Criminal Procedure be, and they hereby are, amended as hereinafter set forth.

[See the amendments made thereby under the respective rules, post]

3. That Forms 1 to 27, inclusive, contained in the Appendix of Forms to the Federal Rules of Criminal Procedure be, and they hereby are, amended as hereinafter specified.

[See the amendments made thereby under the respective forms, post]

4. That these amendments to the Federal Rules of Criminal Procedure shall take effect on the day following the final adjournment of the first regular session of the 81st Congress.

5. That The Chief Justice be authorized to transmit these amendments to the Attorney General with the request that he report them to the Congress at the beginning of the regular session of the 81st Congress in January, 1949.

ORDER OF DECEMBER 27, 1948

1. That the first sentence of Rule 37(a)(1) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[See the amendment made thereby under Rule 37, post]

2. That the first sentence of Rule 38(a)(3) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[See the amendment made thereby under Rule 38, post]

3. That Rule 38(c) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[See the amendment made thereby under Rule 38, post]

4. That Rule 39(b)(2) of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[See the amendment made thereby under Rule 39, post]

5. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on January 1, 1949.

ORDER OF APRIL 12, 1954

That Rule 37 of the Federal Rules of Criminal Procedure be, and it hereby is, amended to read as follows:

[See the amendment made thereby under Rule 37, post]

That the foregoing amendment to the Federal Rules of Criminal Procedure shall take effect on July 1, 1954.

ORDER OF APRIL 9, 1956

1. That Rules 41(a), 46(a)(2), 54(a)(1), and 54(c) of the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended as hereinafter set forth.

[See the amendments made thereby under the respective rules, post]

2. That the Chief Justice be authorized to report these amendments to Congress in accordance with the provisions of Title 18 U.S.C.A. § 3771.

ORDER OF FEBRUARY 28, 1966

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 17.1 and 26.1 and amendments to Rules 4, 5, 6, 7, 11, 14, 16, 17, 18, 20, 21, 23, 24, 25, 28, 29, 30, 32, 33, 34, 35, 37, 38, 40, 44, 45, 46, 49, 54, 55, and 56, and to Form 26, as hereinafter set forth:

[See added and amended Rules, post]

2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of title 18, U.S.C., section 3771.

4. That Rule 19 and subdivision (c) of Rule 45 of the Rules of Criminal Procedure for the United States District Courts, promulgated by this court on December 26, 1944, effective March 21, 1946, are hereby rescinded, effective July 1, 1966.

MR. JUSTICE BLACK, dissenting.

The Amendments to the Federal Rules of Civil and Criminal Procedure today transmitted to the Congress are the work of very capable advisory committees. Those committees, not the Court, wrote the rules. Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give. And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself. This phase of the criminal rules in itself so infects the whole collection of proposals that, without mentioning other objections, I am opposed to transmittal of the proposed amendments to the criminal rules.

I am likewise opposed to transmittal of the proposed revision of the civil rules. In the first place I think the provisions of 28 U.S.C. § 2072 (1964 ed.), under which these rules are transmitted and the corresponding section, 18 U.S.C. § 3771 (1964 ed.), relating to the criminal rules, both of which provide for giving transmitted rules the effect of law as though they had been properly enacted by Congress are unconstitutional for reasons I have previously stated.[1] And in prior dissents I have stated some of the basic reasons for my objections to repeated rules revisions [2] that tend to upset established meanings and need not repeat those grounds of objection here. The confusion created by the adoption of the present rules, over my objection, has been partially dispelled by judicial interpretations of them by this Court and others. New rules and extensive amendments to present rules will mean renewed confusion resulting in new challenges and new reversals and prejudicial "pretrial" dismissals of cases before a trial on the merits for failure of lawyers to understand and comply with new rules of uncertain meaning. Despite my continuing objection to the old rules, it seems to me that since they have at least gained some degree of certainty it would be wiser to "bear those ills we have than fly to others we know not of," unless, of course, we are reasonably sure that the proposed reforms of the old rules are badly needed. But I am not. The

1. In a statement accompanying a previous transmittal of the civil rules, MR. JUSTICE DOUGLAS and I said:

"MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are opposed to the submission of these rules to the Congress under a statute which permits them to 'take effect' and to repeal 'all laws in conflict with such rules' without requiring any affirmative consideration, action, or approval of the rules by Congress or by the President. We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of Congress to reject proposals of an outside agency. * * *" (Footnotes omitted.) 374 U.S. 865–866.

2. 346 U.S. 946, 374 U.S. 865. And see 368 U.S. 1011 and 1012.

new proposals, at least some of them, have, as I view them, objectionable possibilities that cause me to believe our judicial system could get along much better without them.

The momentum given the proposed revision of the old rules by this Court's transmittal makes it practically certain that Congress, just as has this Court, will permit the rules to take effect exactly as they were written by the Advisory Committee on Rules. Nevertheless, I am including here a memorandum I submitted to the Court expressing objections to the Committee's proposals and suggesting changes should they be transmitted. These suggestions chiefly center around rules that grant broad discretion to trial judges with reference to class suits, pretrial procedures, and dismissal of cases with prejudice. Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief of many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out of court affidavits, pretrial depositions, and other pretrial techniques. My belief is that open court trials on the merits where litigants have the right to prove their case or defense best comports with due process of law.

The proposed rules revisions, instead of introducing changes designed to prevent the continued abuse of pretrial power to dismiss cases summarily without trials, move in the opposite direction. Of course, each such dismissal results in removal of one more case from our congested court dockets, but that factor should not weigh more heavily in our system of justice than assuring a full-fledged due process trial of every bona fide lawsuit brought to vindicate an honest, substantial claim. It is to protect this ancient right of a person to have his case tried rather than summarily thrown out of court that I suggested to the Court that it recommend changes in the Committee's proposals of the nature set out in the following memorandum.

"Dear Brethren:

"I have gone over all the proposed amendments carefully and while there are probably some good suggestions, it is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

"In addition, the rules as amended, in my judgment, greatly aggravate the evil of vesting judges with practically uncontrolled power to dismiss with prejudice cases brought by plaintiffs or defenses interposed by defendants. The power to dismiss a plaintiff's case or to render judgments by default against defendants can work great harm to both parties. There are many inherent urges in existence which may subconsciously incline a judge towards disposing of the cases before him without having to go through the burden of a trial. Mr. Chief Justice White, before he became Chief Justice, wrote an opinion in the case of *Hovey* v. *Elliot*, 167 U.S. 409 [17 S.Ct. 841, 42 L.Ed. 215], which pointed out grave constitutional questions raised by attempting to punish the parties by depriving them of the right to try their law suits or to defend against law suits brought against them by others.

"Rule 41 entitled 'Dismissal of Actions' points up the great power of judges to dismiss actions and provides an automatic method under which a dismissal must be construed as a dismissal 'with prejudice' unless the judge specifically states otherwise. For that reason I suggest to the Conference that if the Rules are accepted, including that one, the last sentence of Rule 41(b) be amended so as to provide that a simple order of dismissal by a judge instead of operating 'as an adjudication upon the merits,' as the amended rule reads, shall provide that such a dismissal 'does not operate as an adjudication upon the merits.'

"As a further guarantee against oppressive dismissals I suggest the addition of the following as subdivision (c) of Rule 41.

" 'No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense.'

"This proposed amendment is suggested in order to protect litigants, both plaintiffs and defendants, against being thrown out of court as a penalty for their lawyer's neglect or misconduct. The necessity for such a rule is shown, I think, by the dismissal in the plaintiff's case in *Link* v. *Wabash R. Co.*, 370 U.S. 626 [82 S.Ct. 1386, 8 L.Ed.2d 734]. The usual argument against this suggestion is that a party to a law suit hires his lawyer and should therefore be responsible for everything his lawyer does in the conduct of his case. This may be a good argument with reference to affluent litigants who not only know the best lawyers but are able to hire them. It is a wholly unrealistic argument, however, to make with reference to individual persons who do not know the ability of various lawyers or who are not financially able to hire those at the top of the bar and who are compelled to rely on the assumption that a lawyer licensed by the State is competent. It seems to me to be an uncivilized practice to punish clients by throwing their cases out of court because of their lawyers' conduct. It may be supportable by good, sound,

formal logic but I think has no support whatever in a procedural system supposed to work as far as humanly possible to the end of obtaining equal and exact justice.

"H. L. B."

For all the reasons stated above and in my previous objections to the transmittals of rules I dissent from the transmittals here.

MR. JUSTICE DOUGLAS, dissenting in part.

I reiterate today what I stated on an earlier occasion (374 U.S. 865, 869-870) (statement of Black and Douglas, JJ.), that the responsibility for promulgating Rules of the kind we send to Congress today should rest with the Judicial Conference and not the Court. It is the Judicial Conference, not the Court, which appoints the Advisory Committee on Criminal Rules which makes the actual recommendations.[1] Members of the Judicial Conference, being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.

But since under the statute[2] the Rules go to Congress only on the initiative of the Court, I cannot be only a conduit. I think that placing our imprimatur on the amendments to the Rules entails a large degree of responsibility of judgment concerning them. Some of the Criminal Rules which we forward to Congress today are very bothersome—not in the sense that they may be unwieldy or unworkable—but in the sense that they may entrench on important constitutional rights of defendants.

In my judgment, the amendments to Rule 16 dealing with discovery require further reflection. To the extent that they expand the defendant's opportunities for discovery, they accord with the views of a great many commentators who have concluded that a civilized society ought not to tolerate the conduct of a criminal prosecution as a "game."[3] But the proposed changes in the Rule go further. Rule 16(c) would permit a trial judge to condition granting the defendant discovery on the defendant's willingness to permit the prosecution to discover "scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof" which (1) are in the defendant's possession; (2) he intends to produce at trial; and (3) are shown to be material to the preparation of the prosecution's case.[4]

The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witnesses whose appearance at trial is contemplated by the defense.[5] I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, e. g., *Sherbert* v. *Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 1793-1795, 10 L.Ed.2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. It is said, however, that fairness may require disclosure by a defendant who obtains information from the prosecution. Perhaps—but the proposed rule establishes no such standards. Its application is mechanical: if the defendant is allowed discovery, so, too, is the prosecution. No requirement is imposed, for example, that the subject matter of the material sought to be discovered by the prosecution be limited to that relating to the subject of the defendant's discovery.

The proposed addition of Rule 17.1 also suggests difficulties, perhaps of constitutional dimension. This rule would establish a pretrial conference procedure. The language of the rule and the Advisory Committee's comments suggest that under some circumstances, the conference might even take place in the absence of the defendants! Cf. *Lewis* v. *United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011; Fed.Rules Crim.Proc. Rule 43.

The proposed amendment to Rule 32(c)(2) states that the trial judge "may" disclose to the defendant or his counsel the contents of a presentence report on which he is relying in fixing sentence. The imposition of sentence is of critical importance to a man convicted of crime.

1. 28 U.S.C. § 331 (1964 ed.) which establishes the Judicial Conference of the United States, provides that the Conference shall "carry on a continuous study of the operation and effect of the general rules of practice and procedure * * * prescribed by the Supreme Court * * *." The Conference has resolved that a standing Committee on Rules of Practice and Procedure be appointed by the Chief Justice and that, in addition, five advisory committees be established to recommend to the Judicial Conference changes in the rules of practice and procedure for the federal courts. See Annual Report of the Proceedings of the Judicial Conference of the United States 6-7 (1958).

2. 18 U.S.C. § 3771 (1964 ed.).

3. See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash.U.L.Q. 279; Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif.L.Rev. 56 (1961); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L.Rev. 228 (1964).

4. The proposed rule explicitly provides that the prosecution may not discover nonmedical documents or reports "made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

5. *Jones* v. *Superior Court of Nevada County*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919, 96 A.L.R.2d 1213. See Comment, 51 Calif.L.Rev. 135; Note, 76 Harv.L.Rev. 838 (1963). The case is more extensively treated in Louisell, Criminal Discovery and Self-Incrimination, 53 Calif.L.Rev. 89 (1965).

Trial judges need presentence reports so that they may have at their disposal the fullest possible information. See *Williams* v. *People of State of New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337. But while the formal rules of evidence do not apply to restrict the factors which the sentencing judge may consider, fairness would, in my opinion, require that the defendant be advised of the facts—perhaps very damaging to him—on which the judge intends to rely. The presentence report may be inaccurate, a flaw which may be of constitutional dimension. Cf. *Townsend* v. *Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690. It may exaggerate the gravity of the defendant's prior offenses. The investigator may have made an incomplete investigation. See Tappan, Crime, Justice and Correction 556 (1960). There may be countervailing factors not disclosed by the probation report. In many areas we can rely on the sound exercise of discretion by the trial judge; but how can a judge know whether or not the presentence report calls for a reply by the defendant? Its faults may not appear on the face of the document.

Some States require full disclosure of the report to the defense.[6] The proposed Model Penal Code takes the middle-ground and requires the sentencing judge to disclose to the defense the factual contents of the report so that there is an opportunity to reply.[7] Whatever should be the rule for the federal courts, it ought not to be one which permits a judge to impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply.

I do not think we should approve Rules 16, 17.1, and 32(c)(2). Instead, we should refer them back to the Judicial Conference and the Advisory Committee for further consideration and reflection, where I believe they were approved only by the narrowest majority.

WILLIAM O. DOUGLAS.

ORDER OF DECEMBER 4, 1967

1. That the following rules, to be known as the Federal Rules of Appellate Procedure, be, and they hereby are, prescribed, pursuant to sections 3771 and 3772 of Title 18, United States Code, and sections 2072 and 2075 of Title 28, United States Code, to govern the procedure in appeals to United States courts of appeals from the United States district courts, in the review by United States courts of appeals of decisions of the Tax Court of the United States, in proceedings in the United States courts of appeals for the review or enforcement of orders of administrative agencies, boards, commissions and officers, and in applications for writs or other relief which a United States court of appeals or judge thereof is competent to give:

[See text of Rules of Appellate Procedure, post]

2. That the foregoing rules shall take effect on July 1, 1968, and shall govern all proceedings in appeals and petitions for review or enforcement of orders thereafter brought and in all such proceedings then pending, except to the extent that in the opinion of the court of appeals their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed.

3. *[Certain Rules of Civil Procedure for the United States District Courts, amended]*

4. *[Certain Rules of Civil Procedure for the United States District Courts, and Form 27, abrogated]*

5. That Rules 45, 49, 56 and 57 of the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended, effective July 1, 1968, as hereinafter set forth:

[See amendments made thereby under the respective rules, post]

6. That the chapter heading "VIII. APPEAL", all of Rules 37 and 39, and subdivisions (b) and (c) of Rule 38 of the Rules of Criminal Procedure for the United States District Courts, and Forms 26 and 27 annexed to the said rules, be, and they hereby are, abrogated, effective July 1, 1968.

7. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing new rules and amendments to and abrogation of existing rules, in accordance with the provisions of Title 18, U.S.C., § 3771, and Title 28, U.S.C., §§ 2072 and 2075.

ORDER OF MARCH 1, 1971

1. *[Certain Rules of Civil Procedure for the United States District Courts amended]*

2. That subdivision (a) of Rule 45 and all of Rule 56 of the Federal Rules of Criminal Procedure be, and they hereby are, amended, effective July 1, 1971, to read as follows:

[See amendments made thereby under the respective rules, post]

3. That subdivision (a) of Rule 26 and subdivision (a) of Rule 45 of the Federal Rules of Appellate Procedure be, and they hereby are, amended, effective July 1, 1971, to read as follows:

[See amendments made thereby under the respective rules, post]

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Rules of Civil, Criminal and Appellate Procedure, in accordance with the provisions of Title 18 U.S.C. § 3771, and Title 28 U.S.C. §§ 2072 and 2075.

Mr. Justice Black and Mr. Justice Douglas dissent.

6. *E. g.*, Calif.Penal Code § 1203.

7. Model Penal Code § 7.07(5) (Proposed Official Draft, 1962). The Code provides that the sources of confidential information need not be disclosed. "Less disclosure than this hardly comports with elementary fairness." Comment to § 7.07 (Tent.Draft No. 2, 1954), at 55. A discarded draft of the amendment to Fed.Rules Crim.Proc. Rule 32 would have allowed disclosure to defense counsel of the report, from which the confidential sources would be removed. A defendant not represented by counsel would be told of the "essential facts" in the report. See 8 Moore's Federal Practice ¶¶ 32.03[4], 32.09 (1965).

ORDER OF APRIL 24, 1972

1. That Rules 1, 3, 4(b) & (c), 5, 5.1, 6(b), 7(c), 9(b), (c) & (d), 17(a) & (g), 31(e), 32(b), 38(a), 40, 41, 44, 46, 50, 54 and 55 of the Federal Rules of Criminal Procedure be, and they hereby are, amended effective October 1, 1972, to read as follows:

[See amendments made thereby under the respective rules, post]

2. That Rule 9(c) of the Federal Rules of Appellate Procedure be, and hereby is amended, effective October 1, 1972, to read as follows:

[See amendments made thereby under the respective rules, post]

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to Rules of Criminal and Appellate Procedure, in accordance with the provisions of Title 18, U.S. Code, § 3771 and § 3772.

Mr. Justice Douglas dissented to adoption of Rule 50(b) of the Federal Rules of Criminal Procedure.

ORDER OF NOVEMBER 20, 1972

1. That the rules hereinafter set forth, to be known as the Federal Rules of Evidence, be, and they hereby are, prescribed pursuant to Sections 3402, 3771, and 3772, Title 18, United States Code, and Sections 2072 and 2075, Title 28, United States Code, to govern procedure, in the proceedings and to the extent set forth therein, in the United States courts of appeals, the United States district courts, the District Court for the District of the Canal Zone and the district courts of Guam and the Virgin Islands, and before United States magistrates.

2. That the aforementioned Federal Rules of Evidence shall take effect on July 1, 1973, and shall be applicable to actions and proceedings brought thereafter and also to further procedure in actions and proceedings then pending, except to the extent that in the opinion of the court their application in a particular action or proceeding then pending would not be feasible or would work injustice in which event the former procedure applies.

3. *[Certain Rules of Civil Procedure for the United State District Courts amended]*

4. That subdivision (c) of Rule 32 of the Federal Rules of Civil Procedure be, and it hereby is, abrogated, effective July 1, 1973.

5. That Rules 26, 26.1 and 28 of the Federal Rules of Criminal Procedure be, and they hereby are, amended effective July 1, 1973, to read as hereinafter set forth.

[See amendments made thereby under the respective rules, post]

6. That the Chief Justice be, and he hereby is, authorized to transmit the foregoing new rules and amendments to and abrogation of existing rules to the Congress at the beginning of its next regular session, in accordance with the provisions of Title 18 U.S.C. § 3771 and Title 28 U.S.C. §§ 2072 and 2075.

CONGRESSIONAL ACTION ON PROPOSED RULES OF EVIDENCE AND 1972 AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF CRIMINAL PROCEDURE

Pub.L. 93-12, Mar. 30, 1973, 87 Stat. 9, provided: "That notwithstanding any other provisions of law, the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, and Monday, December 18, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress."

Pub.L. 93-595, § 3, Jan. 2, 1975, 88 Stat. 1959, provided that: "The Congress expressly approves the amendments to the Federal Rules of Civil Procedure, and the amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [Jan. 2, 1975]."

ORDER OF MARCH 18, 1974

1. *[Amended subdivision 14 of Official Bankruptcy Form 7]*

2. That subdivision (a) of Rule 41 and the first paragraph of Rule 50 of the Federal Rules of Criminal Procedure be, and they hereby are, amended, effective July 1, 1974, to read as follows:

[See amendments made thereby under the respective rules, post]

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the foregoing amendments to Official Bankruptcy Form 7 and Rules 41 and 50 of the Federal Rules of Criminal Procedure to the Congress in accordance with Title 28, U.S.C. § 2075, and Title 18, § 3771.

ORDER OF APRIL 22, 1974

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 12.1, 12.2, and 29.1 and amendments to Rules 4, 9(a), 11, 12, 15, 16, 17(f), 20, 32(a), 32(c), 32(e) and 43 as hereinafter set forth:

[See amendments made thereby under the respective rules, post]

2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on August 1, 1974, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

3. That The Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in

accordance with the provisions of title 18, United States Code, sections 3771 and 3772.

Mr. Justice Douglas is opposed to the Court being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution.

CONGRESSIONAL ACTION ON AMENDMENTS TO RULES PROPOSED APRIL 22, 1974

Pub.L. 93–361, July 30, 1974, 88 Stat. 397, provided: "That, notwithstanding the provisions of sections 3771 and 3772 of title 18 of the United States Code, the effective date of the proposed amendments to the Federal Rules of Criminal Procedure which are embraced by the order entered by the United States Supreme Court on April 22, 1974, and which were transmitted to the Congress by the Chief Justice on April 22, 1974, is postponed until August 1, 1975."

Pub.L. 94–64, § 2, July 31, 1975, 89 Stat. 370, provided that: "The amendments proposed by the United States Supreme Court to the Federal Rules of Criminal Procedure which are embraced in the order of that Court on April 22, 1974, are approved except as otherwise provided in this Act and shall take effect on December 1, 1975. Except with respect to the amendment of Rule 11, insofar as it adds Rule 11(e)(6), which shall take effect on August 1, 1975, the amendments made by section 3 of this Act shall also take effect on December 1, 1975."

ORDER OF APRIL 26, 1976

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rule 40.1 and amendments to Rules 6(e), 6(f), 23(b), 23(c), 24(b), 41(a), 41(c), and 50(b) as hereinafter set forth:

[See amendments made thereby under the respective rules, post, and Congressional Action on Amendments to Rules hereunder]

2. That the foregoing amendments and additions to the rules of procedure shall take effect on August 1, 1976, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

3. That The Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and addition to the Rules of Criminal Procedure in accordance with the provisions of Title 18, United States Code, Sections 3771 and 3772.

CONGRESSIONAL ACTION ON AMENDMENTS TO RULES PROPOSED APRIL 26, 1976

Pub.L. 94–349, § 1, July 8, 1976, 90 Stat. 822, provided: "That, notwithstanding the provisions of sections 3771 and 3772 of title 18 of the United States Code, the amendments to rules 6(e), 23, 24, 40.1 and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier. The remainder of the proposed amendments to the Federal Rules of Criminal Procedure [to rules 6(f), 41(a), 41(c)(1), and 50(b)] shall become effective August 1, 1976, pursuant to law."

Pub.L. 95–78, § 1, July 30, 1977, 91 Stat. 319, provided: "That notwithstanding the first section of the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94–349, approved July 8, 1976) the amendments to rules 6(e), 23, 24, 40.1 and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, shall take effect only as provided in this Act."

Section 2(a) of Pub.L. 95–78 provided in part that "The amendment proposed by the Supreme Court to subdivision (e) of rule 6 of such Rules of Criminal Procedure is approved in modified form".

Section 2(b) of Pub.L. 95–78 provided "The amendments proposed by the Supreme Court to subdivisions (b) and (c) of rule 23 of such Rules of Criminal Procedure are approved."

Section 2(c) of Pub.L. 95–78 provided "The amendment proposed by the Supreme Court to rule 24 of such Rules of Criminal Procedure is disapproved and shall not take effect."

Section 2(d) of Pub.L. 95–78 provided "The amendment proposed by the Supreme Court to such Rules of Criminal Procedure, adding a new rule designated as rule 40.1, is disapproved and shall not take effect."

Section 2(e) of Pub.L. 95–78 provided in part that "The amendment proposed by the Supreme Court to subdivision (c) of rule 41 of such Rules of Criminal Procedure is approved in a modified form".

Section 4(b) of Pub.L. 95–78 provided that the amendments to the Federal Rules of Criminal Procedure shall take effect October 1, 1977.

ORDER OF APRIL 30, 1979

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 26.2 and 32.1 and amendments to Rules 6(e), 7(c)(2), 9(a), 11(e)(2) and (6), 17(h), 18, 32(c)(3)(E) and 32(f), 35, 40, 41(a), (b) and (c), and 44(c) as hereinafter set forth:

[See amendments made thereby under the respective rules, post]

2. That the foregoing amendments and additions to the rules of procedure shall take effect on August 1, 1979, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing

amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of Title 18, United States Code, Sections 3771 and 3772.

CONGRESSIONAL ACTION ON AMENDMENTS TO RULES PROPOSED APRIL 30, 1979

Pub.L. 96–42, July 31, 1979, 93 Stat. 326, provided: "That notwithstanding any provision of section 3771 or 3772 of title 18 of the United States Code or of section 2072, 2075, or 2076 of title 28 of the United States Code to the contrary—

"(1) the amendments proposed by the United States Supreme Court and transmitted by the Chief Justice on April 30, 1979, to the Federal Rules of Criminal Procedure affecting rules 11(e)(6), 17(h), 32(f), and 44(c), and adding new rules 26.2 and 32.1, and the amendment so proposed and transmitted to the Federal Rules of Evidence affecting rule 410, shall not take effect until December 1, 1980, or until and then only to the extent approved by Act of Congress, whichever is earlier; and

"(2) the amendment proposed by the United States Supreme Court and transmitted by the Chief Justice on April 30, 1979, affecting rule 40 of the Federal Rules of Criminal Procedure shall take effect on August 1, 1979, with the following amendments:

"(A) In the matter designated as paragraph (1) of subdivision (d), strike out 'in accordance with Rule 32.1(a)'.

"(B) In the matter designated as paragraph (2) of subdivision (d), strike out 'in accordance with Rule 32.1(a)(1)'."

ORDER OF APRIL 28, 1982

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Rule 1, 5(b), 9(a), 9(b)(1), 9(b)(2), 9(c)(1), 9(c)(2), 11(c)(1), 11(c)(4), 11(c)(5), 20(b), 40(d)(1), 40(d)(2), 45(a), 54(a), 54(b)(4) and 54(c) as hereinafter set forth:

[See amendments made thereby under the respective rules, post]

2. That subdivision (d) of Rule 9 of the Federal Rules of Criminal Procedure is hereby abrogated.

3. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on August 1, 1982, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

ORDER OF APRIL 28, 1983

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein new Rules 11(h), 12(i) and 12.2(e), and amendments to Rules 6(e) and (g), 11(a), 12.2(b), (c) and (d), 16(a), 23(b), 32(a), (c) and (d), 35(b) and 55, as hereinafter set forth:

[See amendments made thereby under the respective rules, post]

2. That Rule 58 of the Federal Rules of Criminal Procedure and the Appendix of Forms are hereby abrogated.

3. That the foregoing additions and amendments to the Federal Rules of Criminal Procedure, together with the abrogation of Rule 58 and the Official Forms, shall take effect on August 1, 1983 and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, in proceedings then pending.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing additions to and changes in the Federal Rules of Criminal Procedure in accordance with the provisions of Sections 3771 and 3772 of Title 18, United States Code.

MR. JUSTICE O'CONNOR, dissenting.

With one minor reservation, I join the Court in its adoption of the proposed amendments. They represent the product of considerable effort by the Advisory Committee, and they will institute desirable reforms. My sole disagreement with the Court's action today lies in its failure to recommend correction of an apparent error in the drafting of Proposed Rule 12.2(e).

As proposed, Rule 12.2(e) reads:

"Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention."

Identical language formerly appeared in Fed. Rules Crim. Proc. 11(e)(6) and Fed. Rules Evid. 410, each of which stated that

"[Certain material] is not admissible in any civil or criminal proceeding against the defendant."

Those rules were amended, Supreme Court Order April 30, 1979, 441 U.S. 970, 987, 1007, Pub. Law 96–42, approved July 31, 1979, 93 Stat. 326. After the amendments, the relevant language read,

"[Certain material] is not, in any civil or criminal proceeding, admissible against the defendant."

As the Advisory Committee explained, this minor change was necessary to eliminate an ambiguity. Before the amendment, the word "against" could be read as referring either to the kind of proceeding in which the evidence was offered or to the purpose for which it was offered. Thus, for instance, if a person was a witness in a suit but not a party, it was unclear whether the evidence could be used to impeach him. In such a case, the *use* would be against the person, but the *proceeding* would not be against him. Similarly, if the person wished to introduce the evidence in a proceeding in which he was the defendant, the use, but not the proceeding, would be against him. To eliminate the ambiguity, the Advisory Committee proposed the amendment clarifying that the evidence was inadmissible against the person, regardless

of whether the particular proceeding was against the person. See Adv. Comm. Note to Fed. Rules Crim. Proc. 11(e)(6); Adv. Comm. Note to Fed. Rules Evid. 410.

The same ambiguity inheres in the proposed version of Rule 12.2(e). We should recommend that it be eliminated now. To that extent, I respectfully dissent.

I. SCOPE, PURPOSE, AND CONSTRUCTION

Rule 1. Scope

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1982, eff. Aug. 1, 1982.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. These rules are prescribed under the authority of two acts of Congress, namely: the act of June 29, 1940, ch. 445, 18 U.S.C. former § 687 (now § 3771) (Proceedings in criminal cases prior to and including verdict; power of Supreme Court to prescribe rules), and the act of November 21, 1941, ch. 492, 18 U.S.C. former § 689 (now §§ 3771, 3772) (Proceedings to punish for criminal contempt of court; application to sections 687 and 688).

2. The courts of the United States covered by the rules are enumerated in Rule 54(a). In addition to Federal courts in the continental United States they include district courts in Alaska, Hawaii, Puerto Rico and the Virgin Islands. In the Canal Zone only the rules governing proceedings after verdict, finding or plea of guilty are applicable.

3. While the rules apply to proceedings before commissioners when acting as committing magistrates, they do not govern when a commissioner acts as a trial magistrate for the trial of petty offenses committed on Federal reservations. That procedure is governed by rules adopted by order promulgated by the Supreme Court on January 6, 1941 (311 U.S. 733), pursuant to the act of October 9, 1940, ch. 785, secs. 1–5. See 18 U.S.C. former §§ 576–576d (now §§ 3401, 3402) (relating to trial of petty offenses on Federal reservations by United States commissioners).

1972 AMENDMENT

The rule is amended to make clear that the rules are applicable to courts of the United States and, where the rule so provides, to proceedings before United States magistrates and state or local judicial officers.

Primarily these rules are intended to govern proceedings in criminal cases triable in the United States District Court. Special rules have been promulgated, pursuant to the authority set forth in 28 U.S.C. § 636(c), for the trial of "minor offenses" before United States magistrates. (See Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates (January 27, 1971).)

However, there is inevitably some overlap between the two sets of rules. The Rules of Criminal Procedure for the United States District Courts deal with preliminary, supplementary, and special proceedings which will often be conducted before United States magistrates. This is true, for example, with regard to rule 3—The Complaint; rule 4—Arrest Warrant or Summons Upon Complaint; rule 5—Initial Appearance Before the Magistrate; and rule 5.1—Preliminary Examination. It is also true, for example, of supplementary and special proceedings such as rule 40—Commitment to Another District, Removal; rule 41—Search and Seizure; and rule 46—Release from Custody. Other of these rules, where applicable, also apply to proceedings before United States magistrates. See Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, rule 1—Scope:

These rules govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States magistrates under Title 18, U.S.C. § 3401, and for appeals in such cases to judges of the district courts. To the extent that pretrial and trial procedure and practice are not specifically covered by these rules, the Federal Rules of Criminal Procedure apply as to minor offenses other than petty offenses. All other proceedings in criminal matters, other than petty offenses, before United States magistrates are governed by the Federal Rules of Criminal Procedure.

State and local judicial officers are governed by these rules, but only when the rule specifically so provides. This is the case of rule 3—The Complaint; rule 4—Arrest Warrant or Summons Upon Complaint; and rule 5—Initial Appearance Before the Magistrate. These rules confer authority upon the "magistrate," a term which is defined in new rule 54 as follows:

"Magistrate" includes a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in rules 3, 4, and 5.

Rule 41 provides that a search warrant may be issued by "a judge of a state court of record" and thus confers that authority upon appropriate state judicial officers.

The scope of rules 1 and 54 is discussed in C. Wright, Federal Practice and Procedure: Criminal §§ 21, 871–874 (1969, Supp.1971), and 8 and 8A J. Moore, Federal Practice chapters 1 and 54 (2d ed. Cipes 1970, Supp.1971).

1982 AMENDMENT

The amendment corrects an erroneous cross reference, from Rule 54(c) to Rule 54(a), and replaces the word "defined" with the more appropriate word "provided."

Rule 2. Purpose and Construction

These rules are intended to provide for the just determination of every criminal proceeding. They

shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

NOTES OF ADVISORY COMMITTEE ON RULES

Compare Federal Rules of Civil Procedure, 28 U.S.C., following § 2072, Rule 1 (Scope of Rules), last sentence: "They [the Federal Rules of Civil Procedure, 28 U.S.C., Appendix,] shall be construed to secure the just, speedy, and inexpensive determination of every action."

II. PRELIMINARY PROCEEDINGS

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

The rule generally states existing law and practice, 18 U.S.C. former § 591 (now § 3041) (Arrest and removal for trial); *United States* v. *Simon*, E.D.Pa., 248 F. 980; *United States* v. *Maresca*, S.D.N.Y., 266 F. 713, 719–721. It eliminates, however, the requirement of conformity to State law as to the form and sufficiency of the complaint. See, also, rule 57(b).

1972 AMENDMENT

The amendment deletes the reference to "commissioner or other officer empowered to commit persons charged with offenses against the United States" and substitutes therefor "magistrate."

The change is editorial in nature to conform the language of the rule to the recently enacted Federal Magistrates Act. The term "magistrate" is defined in rule 54.

Rule 4. Arrest Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

(1) Warrant. The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(d) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to

the marshal or other authorized person for execution or service.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(1)-(3), 89 Stat. 370.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. The rule states the existing law relating to warrants issued by commissioner or other magistrate. United States Constitution, Amendment IV; 18 U.S.C. former § 591 (now § 3041) (Arrest and removal for trial).

2. The provision for summons is new, although a summons has been customarily used against corporate defendants, 28 U.S.C. former § 377 (now § 1651) (Power to issue writs); *United States* v. *John Kelso Co.*, 86 F. 304, N.D.Cal., 1898. See also, *Albrecht* v. *United States*, 273 U.S. 1, 8, 47 S.Ct. 250, 71 L.Ed. 505 (1927). The use of the summons in criminal cases is sanctioned by many States, among them Indiana, Maryland, Massachusetts, New York, New Jersey, Ohio, and others. See A.L.I. Code of Criminal Procedure (1931), Commentaries to secs. 12, 13, and 14. The use of the summons is permitted in England by 11 & 12 Vict., c. 42, sec. 1 (1848). More general use of a summons in place of a warrant was recommended by the National Commission on Law Observance and Enforcement, Report on Criminal Procedure (1931) 47. The Uniform Arrest Act, proposed by the Interstate Commission on Crime, provides for a summons. Warner, 28 Va.L.R. 315. See also, Medalie, 4 Lawyers Guild, R. 1, 6.

3. The provision for the issuance of additional warrants on the same complaint embodies the practice heretofore followed in some districts. It is desirable from a practical standpoint, since when a complaint names several defendants, it may be preferable to issue a separate warrant as to each in order to facilitate service and return, especially if the defendants are apprehended at different times and places. Berge, 42 Mich.L.R. 353, 356.

4. Failure to respond to a summons is not a contempt of court, but is ground for issuing a warrant.

Note to Subdivision (b). Compare Rule 9(b) and forms of warrant and summons, Appendix of Forms.

Note to Subdivision (c)(2). This rule and Rule 9(c)(1) modify the existing practice under which a warrant may be served only within the district in which it is issued. *Mitchell* v. *Dexter*, 244 F. 926 (C.C.A.1st, 1917); *Palmer* v. *Thompson*, 20 App.D.C. 273 (1902); but see *In re Christian*, 82 F. 885 (C.C.W.D.Ark., 1897); 2 Op.Atty. Gen. 564. When a defendant is apprehended in a district other than that in which the prosecution has been instituted, this change will eliminate some of the steps that are at present followed: the issuance of a warrant in the district where the prosecution is pending; the return of the warrant non est inventus; the filing of a complaint on the basis of the warrant and its return in the district in which the defendant is found; and the issuance of another warrant in the latter district. The warrant originally issued will have efficacy throughout the United States and will constitute authority for arresting the defendant wherever found. Waite, 27 Jour. of Am. Judicature Soc. 101, 103. The change will not modify or affect the rights of the defendant as to removal. See Rule 40. The authority of the marshal to serve process is not limited to the district for which he is appointed, 28 U.S.C. former § 503 (now § 569).

Note to Subdivision (c)(3). 1. The provision that the arresting officer need not have the warrant in his possession at the time of the arrest is rendered necessary by the fact that a fugitive may be discovered and apprehended by any one of many officers. It is obviously impossible for a warrant to be in the possession of every officer who is searching for a fugitive or who unexpectedly might find himself in a position to apprehend the fugitive. The rule sets forth the customary practice in such matters, which has the sanction of the courts. "It would be a strong proposition in an ordinary felony case to say that a fugitive from justice for whom a capias or warrant was outstanding could not be apprehended until the apprehending officer had physical possession of the capias or the warrant. If such were the law, criminals could circulate freely from one end of the land to the other, because they could always keep ahead of an officer with the warrant." *In re Kosopud*, N.D.Ohio, 272 Fed. 330, 336. Waite, 27 Jour. of Am. Judicature Soc. 101, 103. The rule, however, safeguards the defendant's rights in such case.

2. Service of summons under the rule is substantially the same as in civil actions under Federal Rules of Civil Procedure, Rule 4(d)(1), 28 U.S.C., Appendix.

Note to Subdivision (c)(4). Return of a warrant or summons to the commissioner or other officer is provided by 18 U.S.C. § 603 [§ 4084] (Writs; copy as jailer's authority). The return of all "copies of process" by the commissioner to the clerk of the court is provided by 18 U.S.C. former § 591 (now § 3041); and see Rule 5(c), infra.

1966 AMENDMENT

In *Giordenello* v. *United States*, 357 U.S. 480 (1958) it was held that to support the issuance of a warrant the complaint must contain in addition to a statement "of the essential facts constituting the offense" (Rule 3) a statement of the facts relied upon by the complainant to establish probable cause. The amendment permits the complainant to state the facts constituting probable cause in a separate affidavit in lieu of spelling them out in the complaint. See also *Jaben* v. *United States*, 381 U.S. 214 (1965).

1972 AMENDMENT

Throughout the rule the term "magistrate" is substituted for the term "commissioner." Magistrate is defined in rule 54 to include a judge of the United States, a United States magistrate, and those state and local judicial officers specified in 18 U.S.C. § 3041.

1974 AMENDMENT

The amendments are designed to achieve several objectives: (1) to make explicit the fact that the determination of probable cause may be based upon hearsay evidence; (2) to make clear that probable cause is a prerequisite to the issuance of a summons; and (3) to give priority to the issuance of a summons rather than a warrant.

Subdivision (a) makes clear that the normal situation is to issue a summons.

Subdivision (b) provides for the issuance of an arrest warrant in lieu of or in addition to the issuance of a summons.

Subdivision (b)(1) restates the provision of the old rule mandating the issuance of a warrant when a defendant fails to appear in response to a summons.

Subdivision (b)(2) provides for the issuance of an arrest warrant rather than a summons whenever "a valid reason is shown" for the issuance of a warrant. The reason may be apparent from the face of the complaint or may be provided by the federal law enforcement officer or attorney for the government. See comparable provision in rule 9.

Subdivision (b)(3) deals with the situation in which conditions change after a summons has issued. It affords the government an opportunity to demonstrate the need for an arrest warrant. This may be done in the district in which the defendant is located if this is the convenient place to do so.

Subdivision (c) provides that a warrant or summons may issue on the basis of hearsay evidence. What constitutes probable cause is left to be dealt with on a case-to-case basis, taking account of the unlimited variations in source of information and in the opportunity of the informant to perceive accurately the factual data which he furnishes. See *e.g.*, *Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *Jaben* v. *United States*, 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965); *McCray* v. *Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Note, The Informer's Tip as Probable Cause for Search or Arrest, 54 Cornell L.Rev. 958 (1969); C. Wright, Federal Practice and Procedure: Criminal § 52 (1969, Supp.1971); 8 S. J. Moore, Federal Practice ¶ 4.03 (2d ed. Cipes 1970, Supp.1971).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 4 of the Federal Rules of Criminal Procedure deals with arrest procedures when a criminal complaint has been filed. It provides in pertinent part:

> If it appears . . . that there is probable cause . . . a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the *request* of the attorney for the government a summons instead of a warrant *shall* issue. [emphasis added]

The Supreme Court's amendments make a basic change in Rule 4. As proposed to be amended, Rule 4 gives priority to the issuance of a summons instead of an arrest warrant. In order for the magistrate to issue an arrest warrant, the attorney for the government must show a "valid reason."

B. Committee Action. The Committee agrees with and approves the basic change in Rule 4. The decision to take a citizen into custody is a very important one with far-reaching consequences. That decision ought to be made by a neutral official (a magistrate) rather than by an interested party (the prosecutor).

It has been argued that undesirable consequences will result if this change is adopted—including an increase in the number of fugitives and the introduction of substantial delays in our system of criminal justice. [See testimony of Assistant Attorney General W. Vincent Rakestraw in Hearings on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess., Serial No. 61, at 41–43 (1974) [hereinafter cited as "Hearing 1"].] The Committee has carefully considered these arguments and finds them to be wanting. [The Advisory Committee on Criminal Rules has thoroughly analyzed the arguments raised by Mr. Rakestraw and convincingly demonstrated that the undesirable consequences predicted will not necessarily result. See Hearings on Proposed Amendments to Federal Rules of Criminal Procedure Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Congress, 1st Session, Serial No. 6, at 208–09 (1975) [hereinafter cited "Hearings II"].] The present rule permits the use of a summons in lieu of a warrant. The major difference between the present rule and the proposed rule is that the present rule vests the decision to issue a summons or a warrant in the prosecutor, while the proposed rule vests that decision in a judicial officer. Thus, the basic premise underlying the arguments against the proposed rule is the notion that only the prosecutor can be trusted to act responsibly in deciding whether a summons or a warrant shall issue.

The Committee rejects the notion that the federal judiciary cannot be trusted to exercise discretion wisely and in the public interest.

The Committee recast the language of Rule 4(b). No change in substance is intended. The phrase "valid reason" was changed to "good cause," a phrase with which lawyers are more familiar. [Rule 4, both as proposed by the Supreme Court and as changed by the Committee, does not in any way authorize a magistrate to issue a summons or a warrant sua sponte, nor does it enlarge, limit or change in any way the law governing warrantless arrests.]

The Committee deleted two sentences from Rule 4(c). These sentences permitted a magistrate to question the complainant and other witnesses under oath and required the magistrate to keep a record or summary of such a proceeding. The Committee does not intend this change to discontinue or discourage the practice of having the complainant appear personally or the practice of making a record or summary of such an appearance. Rather, the Committee intended to leave Rule 4(c) neutral on this matter, neither encouraging nor discouraging these practices.

The Committee added a new section that provides that the determination of good cause for the issuance of a warrant in lieu of a summons shall not be grounds for a motion to suppress evidence. This provision does not apply when the issue is whether there was probable cause to believe an offense has been committed. This provision does not in any way expand or limit the so-called "exclusionary rule."

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94–414

Rule 4(e)(3) deals with the manner in which warrants and summonses may be served. The House version provides two methods for serving a summons: (1) personal service upon the defendant, or (2) service by leaving it with someone of suitable age at the defendant's dwelling *and* by mailing it to the defendant's last known address. The Senate version provides three methods: (1) personal service, (2) service by leaving it with someone of suitable age at the defendant's dwelling, or (3) service by mailing it to defendant's last known address.

Rule 5. Initial Appearance Before the Magistrate

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Misdemeanors. If the charge against the defendant is a misdemeanor triable by a United States magistrate under 18 U.S.C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates.

(c) Offenses Not Triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1982, eff. Aug. 1, 1982; Oct. 12, 1984, Pub.L. 98–473, Title II, § 209(a), 98 Stat. 1986.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. The time within which a prisoner must be brought before a committing magistrate is defined differently in different statutes. The rule supersedes all statutory provisions on this point and fixes a single standard, i.e., "without unnecessary delay", 18 U.S.C. former § 593 (Operating illicit distillery; arrest; bail); 18 U.S.C. former § 595 (Persons arrested taken before nearest officer for hearing); 5 U.S.C. former § 300a (now 18 U.S.C. §§ 3052, 3107) (Division of Investigation; authority of officers to serve warrants and make arrests); 16 U.S.C. former § 10 (Arrests by employees of park service for violations of laws and regulations); 16 U.S.C. § 706 (Migratory Bird Treaty Act; arrests; search warrants); D.C.Code (1940), Title 4, sec. 140 (Arrests without warrant); see, also, 33 U.S.C. former § 436, §§ 446, 452; 46 U.S.C. former § 708 (now 18 U.S.C. § 2279). What constitutes "unnecessary delay", i.e., reasonable time within which the prisoner should be brought before a committing magistrate, must be determined in the light of all the facts and circumstances of the case. The following authorities discuss the question what constitutes reasonable time for this purpose in various situations: *Carroll* v. *Parry*, 48 App.D.C. 453; *Janus* v. *United States*, 38 F.2d 431, C.C.A.9th; *Commonwealth* v. *Di Stasio*, 294 Mass. 273, 1 N.E.2d 189; *State* v. *Freeman*, 86 N.C. 683; *Peloquin* v. *Hibner*, 231 Wis. 77, 285 N.W. 380; see, also, Warner, 28 Va.L.R. 315, 339–341.

2. The rule also states the prevailing State practice, A.L.I. Code of Criminal Procedure (1931), Commentaries to secs. 35, 36.

Note to Subdivisions (b) and (c). 1. These rules prescribe a uniform procedure to be followed at preliminary hearings before a commissioner. They supersede the general provisions of 18 U.S.C. former § 591 (now § 3041) (Arrest and removal for trial). The procedure prescribed by the rules is that generally prevailing. See *Wood* v. *United States*, 128 F. 265, 271–272, App.D.C.; A.L.I. Code of Criminal Procedure (1931), secs. 39–60 and Commentaries thereto; Manual for United States Commissioners, pp. 6–10, published by Administrative Office of the United States Courts.

2. Pleas before a commissioner are excluded, as a plea of guilty at this stage has no legal status or function except to serve as a waiver of preliminary examination. It has been held inadmissible in evidence at the trial, if the defendant was not represented by counsel when the plea was entered. *Wood* v. *United States*, 128 F.2d 265, App.D.C. The rule expressly provides for a waiver of examination, thereby eliminating any necessity for a provision as to plea.

1966 AMENDMENT

The first change is designed to insure that under the revision made in Rule 4(a) the defendant arrested on a warrant will receive the same information concerning the basis for the issuance of the warrant as would previously have been given him by the complaint itself.

The second change obligates the commissioner to inform the defendant of his right to request the assignment of counsel if he is unable to obtain counsel. Cf. the amendment to Rule 44, and the Advisory Committee's Note thereon.

1972 AMENDMENT

There are a number of changes made in rule 5 which are designed to improve the editorial clarity of the rule; to conform the rule to the Federal Magistrates Act; and to deal explicitly in the rule with issues as to which the rule was silent and the law uncertain.

The principal editorial change is to deal separately with the initial appearance before the magistrate and the preliminary examination. They are dealt with together in old rule 5. They are separated in order to prevent confusion as to whether they constitute a single or two separate proceedings. Although the preliminary examination can be held at the time of the initial appearance, in practice this ordinarily does not occur. Usually counsel need time to prepare for the preliminary examination and as a consequence a separate date is typically set for the preliminary examination.

Because federal magistrates are reasonably available to conduct initial appearances, the rule is drafted on the assumption that the initial appearance is before a federal magistrate. If experience under the act indicates that there must be frequent appearances before state or local judicial officers it may be desirable to draft an additional rule, such as the following, detailing the procedure for an initial appearance before a state or local judicial officer:

Initial Appearance Before a State or Local Judicial Officer. If a United States magistrate is not reasonably available under rule 5(a), the arrested person shall be brought before a state or local judicial officer authorized by 18 U.S.C. § 3041, and such officer shall inform the person of the rights specified in rule 5(c) and shall authorize the release of the arrested person under the terms provided for by these rules and by 18 U.S.C. § 3146. The judicial officer shall immediately transmit any written order of release and any papers filed before him to the appropriate United States magistrate of the district and order the arrested person to appear before such United States magistrate within three days if not in custody or at the next regular hour of business of the United States magistrate if the arrested person is retained in custody. Upon his appearance before the United States magistrate, the procedure shall be that prescribed in rule 5.

Several changes are made to conform the language of the rule to the Federal Magistrates Act.

(1) The term "magistrate," which is defined in new rule 54, is substituted for the term "commissioner." As defined, "magistrate" includes those state and local judicial officers specified in 18 U.S.C. § 3041, and thus the initial appearance may be before a state or local judicial officer when a federal magistrate is not reasonably available. This is made explicit in subdivision (a).

(2) Subdivision (b) conforms the rule to the procedure prescribed in the Federal Magistrates Act when a defendant appears before a magistrate charged with a "minor offense" as defined in 18 U.S.C. § 3401(f):

"misdemeanors punishable under the laws of the United States, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both, except that such term does not include . . . [specified exceptions]."

If the "minor offense" is tried before a United States magistrate, the procedure must be in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates (January 27, 1971).

(3) Subdivision (d) makes clear that a defendant is not entitled to a preliminary examination if he has been indicted by a grand jury prior to the date set for the preliminary examination or, in appropriate cases, if any information is filed in the district court prior to that date. See C. Wright, Federal Practice and Procedure: Criminal § 80, pp. 137–140 (1969, Supp.1971). This is also provided in the Federal Magistrates Act, 18 U.S.C. § 3060(e).

Rule 5 is also amended to deal with several issues not dealt with in old rule 5:

Subdivision (a) is amended to make clear that a complaint, complying with the requirements of rule 4(a), must be filed whenever a person has been arrested without a warrant. This means that the complaint, or an affidavit or affidavits filed with the complaint, must show probable cause. As provided in rule 4(a) the showing of probable cause "may be based upon hearsay evidence in whole or in part."

Subdivision (c) provides that defendant should be notified of the general circumstances under which he is entitled to pretrial release under the Bail Reform Act of 1966 (18 U.S.C. §§ 3141–3152). Defendants often do not in fact have counsel at the initial appearance and thus, unless told by the magistrate, may be unaware of their right to pretrial release. See C. Wright, Federal Practice and Procedure: Criminal § 78 N. 61 (1969).

Subdivision (c) makes clear that a defendant who does not waive his right to trial before a judge of the district court is entitled to a preliminary examination to determine probable cause for any offense except a petty of-

fense. It also, by necessary implication, makes clear that a defendant is not entitled to a preliminary examination if he consents to be tried on the issue of guilt or innocence by the United States magistrate, even though the offense may be one not heretofore triable by the United States commissioner and therefore one as to which the defendant had a right to a preliminary examination. The rationale is that the preliminary examination serves only to justify holding the defendant in custody or on bail during the period of time it takes to bind the defendant over to the district court for trial. See *State* v. *Solomon*, 158 Wis. 146, 147 N.W. 640 (1914). A similar conclusion is reached in the New York Proposed Criminal Procedure Law. See McKinney's Session Law News, April 10, 1969, at p. A–119.

Subdivision (c) also contains time limits within which the preliminary examination must be held. These are taken from 18 U.S.C. § 3060. The provisions for the extension of the prescribed time limits are the same as the provisions of 18 U.S.C. § 3060 with two exceptions: The new language allows delay consented to by the defendant only if there is "a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases." This reflects the view of the Advisory Committee that delay, whether prosecution or defense induced, ought to be avoided whenever possible. The second difference between the new rule and 18 U.S.C. § 3060 is that the rule allows the decision to grant a continuance to be made by a United States magistrate as well as by a judge of the United States. This reflects the view of the Advisory Committee that the United States magistrate should have sufficient judicial competence to make decisions such as that contemplated in subdivision (c).

1982 AMENDMENT

The amendment of subdivision (b) reflects the recent amendment of 18 U.S.C. § 3401(a), by the Federal Magistrate Act of 1979, to read: "When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district."

Rule 5.1. Preliminary Examination

(a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) Discharge of Defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(c) Records. After concluding the proceeding the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall promptly make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that he is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

(Added Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 5.1 is, for the most part, a clarification of old rule 5(c).

Under the new rule, the preliminary examination must be conducted before a "federal magistrate" as defined in rule 54. Giving state or local judicial officers authority to conduct a preliminary examination does not seem necessary. There are not likely to be situations in which a "federal magistrate" is not "reasonably available" to conduct the preliminary examination, which is usually not held until several days after the initial appearance provided for in rule 5.

Subdivision (a) makes clear that a finding of probable cause may be based on "hearsay evidence in whole or in part." The propriety of relying upon hearsay at the preliminary examination has been a matter of some un-

certainty in the federal system. See C. Wright, Federal Practice and Procedure: Criminal § 80 (1969, Supp.1971); 8 J. Moore, Federal Practice ¶ 504[4] (2d ed. Cipes 1970, Supp.1971); *Washington* v. *Clemmer*, 339 F.2d 715, 719 (D.C.Cir.1964); *Washington* v. *Clemmer*, 339 F.2d 725, 728 (D.C.Cir.1964); *Ross* v. *Sirica*, 380 F.2d 557, 565 (D.C.Cir.1967); *Howard* v. *United States*, 389 F.2d 287, 292 (D.C.Cir.1967); Weinberg and Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich.L.Rev. 1361, especially n. 92 at 1383 (1969); D. Wright, The Rules of Evidence Applicable to Hearings in Probable Cause, 37 Conn.B.J. 561 (1963), Comment, Preliminary Examination—Evidence and Due Process, 15 Kan.L.Rev. 374, 379–381 (1967).

A grand jury indictment may properly be based upon hearsay evidence. *Costello* v. *United States*, 350 U.S. 359 (1956); 8 J. Moore, Federal Practice ¶ 6.03[2] (2d ed. Cipes 1970, Supp.1971). This being so, there is practical advantage in making the evidentiary requirements for the preliminary examination as flexible as they are for the grand jury. Otherwise there will be increased pressure upon United States Attorneys to abandon the preliminary examination in favor of the grand jury indictment. See C. Wright, Federal Practice and Procedure: Criminal § 80 at p. 143 (1969). New York State, which also utilizes both the preliminary examination and the grand jury, has under consideration a new Code of Criminal Procedure which would allow the use of hearsay at the preliminary examination. See McKinney's Session Law News, April 10, 1969, pp. A119–A120.

For the same reason, subdivision (a) also provides that the preliminary examination is not the proper place to raise the issue of illegally obtained evidence. This is current law. In *Giordenello* v. *United States*, 357 U.S. 480, 484 (1958), the Supreme Court said:

[T]he Commissioner here had no authority to adjudicate the admissibility at petitioner's later trial of the heroin taken from his person. That issue was for the trial court. This is specifically recognized by Rule 41(e) of the Criminal Rules, which provides that a defendant aggrieved by an unlawful search and seizure may "* * * move the district court * * * to suppress for use as evidence anything so obtained on the ground that * * *" the arrest warrant was defective on any of several grounds.

Dicta in *Costello* v. *United States*, 350 U.S. 359, 363–364 (1956), and *United States* v. *Blue*, 384 U.S. 251, 255 (1966), also support the proposed rule. In *United States ex rel. Almeida* v. *Rundle*, 383 F.2d 421, 424 (3d Cir. 1967), the court, in considering the adequacy of an indictment said:

On this score, it is settled law that (1) "[an] indictment returned by a legally constituted nonbiased grand jury, * * * is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.", *Lawn* v. *United States*, 355 U.S. 399, 349, 78 S.Ct. 311, 317, 2 L.Ed.2d 321 (1958); (2) an indictment cannot be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury", *Costello* v. *United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956); and (3) a prosecution is not abated, nor barred, even where "tainted evidence" has been submitted to a grand jury, *United States* v. *Blue*, 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966). See also C. Wright, Federal Practice and Procedure: Criminal § 80 at 143 n. 5 (1969, Supp.1971); 8 J. Moore, Federal Practice ¶ 6.03[3] (2d ed. Cipes 1970, Supp.1971). The Manual for United States Commissioners (Administrative Office of United States Courts, 1948) provides at pp. 24–25: "Motions for this purpose [to suppress illegally obtained evidence] may be made and heard only before a district judge. Commissioners are not empowered to consider or act upon such motions."

It has been urged that the rules of evidence at the preliminary examination should be those applicable at the trial because the purpose of the preliminary examination should be, not to review the propriety of the arrest or prior detention, but rather to determine whether there is evidence sufficient to justify subjecting the defendant to the expense and inconvenience of trial. See Weinberg and Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich.L.Rev. 1361, 1396–1399 (1969). The rule rejects this view for reasons largely of administrative necessity and the efficient administration of justice. The Congress has decided that a preliminary examination shall not be required when there is a grand jury indictment (18 U.S.C. § 3060). Increasing the procedural and evidentiary requirements applicable to the preliminary examination will therefore add to the administrative pressure to avoid the preliminary examination. Allowing objections to evidence on the ground that evidence has been illegally obtained would require two determinations of admissibility, one before the United States magistrate and one in the district court. The objective is to reduce, not increase, the number of preliminary motions.

To provide that a probable cause finding may be based upon hearsay does not preclude the magistrate from requiring a showing that admissible evidence will be available at the time of trial. See Comment, Criminal Procedure—Grand Jury—Validity of Indictment Based Solely on Hearsay Questioned When Direct Testimony Is Readily Available, 43 N.Y.U.L.Rev. 578 (1968); *United States* v. *Umans*, 368 F.2d 725 (2d Cir. 1966), cert. dismissed as improvidently granted 389 U.S. 80 (1967); *United States* v. *Andrews*, 381 F.2d 377, 378 (2d Cir. 1967); *United States* v. *Messina*, 388 F.2d 393, 394 n. 1 (2d Cir. 1968); *United States* v. *Beltram*, 388 F.2d 449 (2d Cir. 1968); and *United States* v. *Arcuri*, 282 F.Supp. 347 (E.D.N.Y.1968). The fact that a defendant is not entitled to object to evidence alleged to have been illegally obtained does not deprive him of an opportunity for a pretrial determination of the admissibility of evidence. He can raise such an objection prior to trial in accordance with the provisions of rule 12.

Subdivision (b) makes it clear that the United States magistrate may not only discharge the defendant but may also dismiss the complaint. Current federal law authorizes the magistrate to discharge the defendant but he must await authorization from the United States Attorney before he can close his records on the case by dismissing the complaint. Making dismissal of the complaint a separate procedure accomplishes no worthwhile objective, and the new rule makes it clear that the magistrate can both discharge the defendant and file the record with the clerk.

Subdivision (b) also deals with the legal effect of a discharge of a defendant at a preliminary examination. This issue is not dealt with explicitly in the old rule. Existing federal case law is limited. What cases there are seem to support the right of the government to issue a new complaint and start over. See *e.g., Collins* v. *Loisel*, 262 U.S. 426 (1923); *Morse* v. *United States*, 267 U.S. 80 (1925). State law is similar. See *People* v. *Dillon*, 197 N.Y. 254, 90 N.E. 820 (1910); *Tell* v. *Wolke*, 21 Wis.2d 613, 124 N.W.2d 655 (1963). In the *Tell* case the Wisconsin court stated the common rationale for allowing the prosecutor to issue a new complaint and start over:

The state has no appeal from errors of law committed by a magistrate upon preliminary examination and the discharge on a preliminary would operate as an unchallengeable acquittal. * * * The only way an error of law committed on the preliminary examination prejudicial to the state may be challenged or corrected is by a preliminary examination on a second complaint. (21 Wis.2d at 619–620.)

Subdivision (c) is based upon old rule 5(c) and upon the Federal Magistrates Act, 18 U.S.C. § 3060(f). It provides methods for making available to counsel the record of the preliminary examination. See C. Wright, Federal Practice and Procedure: Criminal § 82 (1969, Supp.1971). The new rule is designed to eliminate delay and expense occasioned by preparation of transcripts where listening to the tape recording would be sufficient. Ordinarily the recording should be made available pursuant to subdivision (c)(1). A written transcript may be provided under subdivision (c)(2) at the discretion of the court, a discretion which must be exercised in accordance with *Britt* v. *North Carolina*, 404 U.S. 226, 30 L.Ed.2d 400, 405 (1971):

A defendant who claims the right to a free transcript does not, under our cases, bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. In this case, however, petitioner has conceded that he had available an informal alternative which appears to be substantially equivalent to a transcript. Accordingly, we cannot conclude that the court below was in error in rejecting his claim.

III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and Deputy Foreman. The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the

attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(iii) when the disclosure is made by an attorney for the government to another federal grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

(g) Discharge and Excuse. A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination

that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 26, 1976, eff. Aug. 1, 1976; July 30, 1977, Pub.L. 95–78, § 2(a), 91 Stat. 319; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983.)

Amendment of Subsec. (e)(3)(C)(iv)

Pub.L. 98–473, Title II, §§ 215(f), 235, Oct. 12, 1984, 98 Stat. 2016, 2031, provided that, effective Nov. 1, 1986, subsec. (e)(3)(C) of this rule is amended by adding the following subdivision:

"(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.".

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. The first sentence of this rule vests in the court full discretion as to the number of grand juries to be summoned and as to the times when they should be convened. This provision supersedes the existing law, which limits the authority of the court to summon more than one grand jury at the same time. At present two grand juries may be convened simultaneously only in a district which has a city or borough of at least 300,000 inhabitants, and three grand juries only in the Southern District of New York, 28 U.S.C. former § 421 (Grand juries; when, how and by whom summoned; length of service). This statute has been construed, however, as only limiting the authority of the court to summon more than one grand jury for a single place of holding court, and as not circumscribing the power to convene simultaneously several grand juries at different points within the same district, *Morris* v. *United States*, 128 F.2d 912, C.C.A.5th; *United States* v. *Perlstein*, 39 F.Supp. 965, D.N.J.

2. The provision that the grand jury shall consist of not less than 16 and not more than 23 members continues existing law, 28 U.S.C. former § 419 (now 18 U.S.C. § 3321) (Grand jurors; number when less than required number).

3. The rule does not affect or deal with the method of summoning and selecting grand juries. Existing statutes on the subjects are not superseded. See 28 U.S.C. former §§ 411–426 (now §§ 1861–1870). As these provisions of law relate to jurors for both criminal and civil cases, it seemed best not to deal with this subject.

Note to Subdivision (b)(1). Challenges to the array and to individual jurors, although rarely invoked in connection with the selection of grand juries, are nevertheless permitted in the Federal courts and are continued by this rule, *United States* v. *Gale*, 109 U.S. 65, 69–70, 3 S.Ct. 1, 27 L.Ed. 857; *Clawson* v. *United States*, 114 U.S. 477, 5 S.Ct. 949, 29 L.Ed. 179; *Agnew* v. *United States*, 165 U.S. 36, 44, 17 S.Ct. 235, 41 L.Ed. 624. It is not contemplated, however, that defendants held for action of the grand jury shall receive notice of the time and place of the impaneling of a grand jury, or that defendants in custody shall be brought to court to attend at the selection of the grand jury. Failure to challenge is not a waiver of any objection. The objection may still be interposed by motion under Rule 6(b)(2).

Note to Subdivision (b)(2). 1. The motion provided by this rule takes the place of a plea in abatement, or motion to quash. *Crowley* v. *United States*, 194 U.S. 461, 469–474, 24 S.Ct. 731, 48 L.Ed. 1075; *United States* v. *Gale*, *supra*.

2. The second sentence of the rule is a restatement of 18 U.S.C. former § 554(a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring), and introduces no change in existing law.

Note to Subdivision (c). 1. This rule generally is a restatement of existing law, 18 U.S.C. former § 554(a) and 28 U.S.C. former § 420. Failure of the foreman to sign or endorse the indictment is an irregularity and is not fatal, *Frisbie* v. *United States*, 157 U.S. 160, 163–165, 15 S.Ct. 586, 39 L.Ed. 657.

2. The provision for the appointment of a deputy foreman is new. Its purpose is to facilitate the transaction of business if the foreman is absent. Such a provision is found in the law of at least one State, N.Y. Code Criminal Procedure, sec. 244.

Note to Subdivision (d). This rule generally continues existing law. See 18 U.S.C. former § 556 (Indictments and presentments; defects of form); and 5 U.S.C. § 310 [28 § 515(a)] (Conduct of legal proceedings).

Note to Subdivision (e). 1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure, *Schmidt* v. *United States*, 115 F.2d 394, C.C.A.6th; *United States* v. *American Medical Association*, 26 F.Supp. 429, D.C.; Cf. *Atwell* v. *United States*, 162 Fed. 97, C.C.A.4th; and see 18 U.S.C. former § 554(a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring). Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice.

2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.

3. The last sentence authorizing the court to seal indictments continues present practice.

Note to Subdivision (f). This rule continues existing law, 18 U.S.C. former § 554 (Indictments and presentments; by twelve grand jurors). The purpose of the last sentence is to provide means for a prompt release of a defendant if in custody, or exoneration of bail if he is on bail, in the event that the grand jury considers the case of a defendant held for its action and finds no indictment.

Note to Subdivision (g). Under existing law a grand jury serves only during the term for which it is summoned, but the court may extend its period of service for as long as 18 months, 28 U.S.C. former § 421. During the extended period, however, a grand jury may conduct only investigations commenced during the original term. The rule continues the 18 months' maximum for the period of service of a grand jury, but provides for such service as a matter of course, unless the court terminates it at an earlier date. The matter is left in the discretion of the court, as it is under existing law. The expiration of a term of court as a time limitation is elsewhere entirely eliminated (Rule 45(c)) and specific time limitations are substituted therefor. This was previously done by the Federal Rules of Civil Procedure for the civil side of the courts (Federal Rules of Civil Procedure, Rule 6(c), 28 U.S.C., Appendix). The elimination of the requirement that at an extended period the grand jury may continue only investigations previously commenced, will obviate such a controversy as was presented in *United States* v. *Johnson*, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546, rehearing denied 320 U.S. 808, 64 S.Ct. 25, 88 L.Ed. 488.

1966 AMENDMENT

Subdivision (d).—The amendment makes it clear that recording devices may be used to take evidence at grand jury sessions.

Subdivision (e).—The amendment makes it clear that the operator of a recording device and a typist who transcribes recorded testimony are bound to the obligation of secrecy.

Subdivision (f).—A minor change conforms the language to what doubtless is the practice. The need for a report to the court that no indictment has been found may be present even though the defendant has not been "held to answer." If the defendant is in custody or has given bail, some official record should be made of the grand jury action so that the defendant can be released or his bail exonerated.

1972 AMENDMENT

Subdivision (b)(2) is amended to incorporate by express reference the provisions of the Jury Selection and Service Act of 1968. That act provides in part:

> The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime [or] the Attorney General of the United States * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. [28 U.S.C. § 1867(c)]

Under rule 12(e) the judge shall decide the motion before trial or order it deferred until after verdict. The authority which the judge has to delay his ruling until after verdict gives him an option which can be exercised to prevent the unnecessary delay of a trial in the event that a motion attacking a grand jury is made on the eve of the trial. In addition, rule 12(c) gives the judge authority to fix the time at which pretrial motions must be made. Failure to make a pretrial motion at the appropriate time may constitute a waiver under rule 12(f).

1976 AMENDMENT

Under the proposed amendment to rule 6(f), an indictment may be returned to a federal magistrate. ("Federal magistrate" is defined in rule 54(c) as including a United States magistrate as defined in 28 U.S.C. §§ 631–639 and a judge of the United States.) This change will foreclose the possibility of noncompliance with the Speedy Trial Act timetable because of the nonavailability of a judge. Upon the effective date of certain provisions of the Speedy Trial Act of 1974, the timely return of indictments will become a matter of critical importance; for the year commencing July 1, 1976, indictments must be returned within 60 days of arrest or summons, for the year following within 45 days, and thereafter within 30 days. 18 U.S.C. §§ 3161(b) and (f), 3163(a). The problem is acute in a one-judge district where, if the judge is holding court in another part of the district, or is otherwise absent, the return of the indictment must await the later reappearance of the judge at the place where the grand jury is sitting.

A corresponding change has been made to that part of subdivision (f) which concerns the reporting of a "no bill," and to that part of subdivision (e) which concerns keeping an indictment secret.

The change in the third sentence of rule 6(f) is made so as to cover all situations in which by virtue of a pending complaint or information the defendant is in custody or released under some form of conditional release.

1977 AMENDMENT

The proposed definition of "attorneys for the government" in subdivision (e) is designed to facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation. The phrase "other government personnel" includes, but is not limited to, employees of administrative agencies and government departments.

Present subdivision (e) provides for disclosure "to the attorneys for the government for use in the performance of their duties." This limitation is designed to further "the long established policy that maintains the secrecy of the grand jury in federal courts." United States v. Procter and Gamble Co., 356 U.S. 677 (1958).

As defined in rule 54(c), "'Attorney for the government' means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam * * *." The limited nature of this definition is pointed out in In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962) at 443:

> The term attorneys for the government is restrictive in its application. * * * If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided.

The proposed amendment reflects the fact that there is often government personnel assisting the Justice Department in grand jury proceedings. In In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D.Pa.1971), the opinion quoted the United States Attorney:

> It is absolutely necessary in grand jury investigations involving analysis of books and records, for the government attorneys to rely upon investigative personnel (from the government agencies) for assistance.

See also 8 J. Moore, Federal Practice ¶ 6.05 at 6–28 (2d ed. Cipes, 1969):

> The rule [6(e)] has presented a problem however, with respect to attorneys and nonattorneys who are assisting in preparation of a case for the grand jury. * * * These assistants often cannot properly perform their work without having access to grand jury minutes.

Although case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. The court may inquire as to the good faith of the assisting personnel, to ensure that access to material is not merely a subterfuge to gather evidence unattainable by means other than the grand jury. This approach was taken in In re Grand Jury Investigation of William H. Pflaumer & Sons, Inc., 53 F.R.D. 464 (E.D.Pa.1971); In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956); United States v. Anzelimo, 319 F.Supp. 1106 (D.C.La.1970). Another case, Application of Kelly, 19 F.R.D. 269 (S.D.N.Y. 1956), assumed, without deciding, that assistance given the attorney for the government by IRS and FBI agents was authorized.

The change at line 27 reflects the fact that under the Bail Reform Act of 1966 some persons will be released without requiring bail. See 18 U.S.C. §§ 3146, 3148.

Under the proposed amendment to rule 6(f), an indictment may be returned to a federal magistrate. ("Federal magistrate" is defined in rule 54(c) as including a United States magistrate as defined in 28 U.S.C. §§ 631–639 and a judge of the United States.) This change will foreclose the possibility of noncompliance with the Speedy Trial Act timetable because of the nonavailability of a judge. Upon the effective date of certain provisions of the Speedy Trial Act of 1974, the timely return of indictments will become a matter of critical importance; for the year commencing July 1, 1976, indictments must be returned within 60 days of arrest or summons, for the year following within 45 days, and thereafter within 30 days. 18 U.S.C. §§ 3161(b) and (f), 3163(a). The problem is acute in a one-judge district where, if the judge is holding court in another part of the district or is otherwise absent, the return of the indictment must await the later reappearance of the judge at the place where the grand jury is sitting.

A corresponding change has been made to that part of subdivision (f) which concerns the reporting of a "no bill," and to that part of subdivision (e) which concerns keeping an indictment secret.

The change in the third sentence of rule 6(f) is made so as to cover all situations in which by virtue of a pending complaint or information the defendant is in custody or released under some form of conditional release.

Notes of Committee on the Judiciary, Senate Report No. 95–354. Amendments Proposed by the Supreme Court.

Rule 6(e) currently provides that "disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties." Rule 54(c) defines attorneys for the government to mean "the Attorney General, an authorized assistant to the Attorney General, a United States attorney, and an authorized assistant of the United States attorney, and when applicable to cases arising under the laws of Guam, means the Attorney General of Guam. . . ."

The Supreme Court proposal would change Rule 6(e) by adding the following new language:

> For purposes of this subdivision, "attorneys for the government" includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties.

It would also make a series of changes in the rule designed to make its provisions consistent with other provisions in the Rules and the Bail Reform Act of 1966.

The Advisory Committee note states that the proposed amendment is intended "to facilitate an increasing need, on the part of Government attorneys to make use of outside expertise in complex litigation". The note indicated that:

> Although case law is limited, the trend seems to be in the direction of allowing disclosure to Government personnel who assist attorneys for the Government in situations where their expertise is required. This is subject to the qualification that the matter disclosed be used only for the purposes of the grand jury investigation.

It is past history at this point that the Supreme Court proposal attracted substantial criticism, which seemed to stem more from the lack of precision in defining, and consequent confusion and uncertainty concerning, the intended scope of the proposed change than from a fundamental disagreement with the objective.

Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees. Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws.

The parameters of the authority of an attorney for the government to disclose grand jury information in the course of performing his own duties is not defined by Rule 6. However, a commonsense interpretation prevails, permitting "Representatives of other government agencies actively assisting United States attorneys in a grand jury investigation . . . access to grand jury material in the performance of their duties." Yet projected against this current practice, and the weight of case law, is the anomalous language of Rule 6(e) itself, which, in its present state of uncertainty, is spawning some judicial decisions highly restrictive of the use of government experts that require the government to "show the neces-

sity (to the Court) for each particular person's aid rather than showing merely a general necessity for assistance, expert or otherwise" and that make Rule 6(e) order subject to interlocutory appeal.

In this state of uncertainty, the Committee believes it is timely to redraft subdivision (e) of Rule 6 to make it clear.

Paragraph (1) as proposed by the Committee states the general rule that a grand jury, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or government personnel to whom disclosure is made under paragraph (2)(A)(ii) shall not disclose matters occurring before the grand jury except as otherwise provided in these rules. It also expressly provides that a knowing violation of Rule 6 may be punished as a contempt of court. In addition, it carries forward the current provision that no obligation of secrecy may be imposed on any person except in accordance with this Rule.

Having stated the general rule of nondisclosure, paragraph (2) sets forth exemptions from nondisclosure. Subparagraph (A) of paragraph (2) provides that disclosure otherwise prohibited, other than the grand jury deliberations and the vote of any grand juror, may be made to an attorney for the government for use in the performance of his duty and to such personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. In order to facilitate resolution of subsequent claims of improper disclosure, subparagraph (B) further provides that the names of government personnel designated to assist the attorney for the government shall be promptly provided to the district court and such personnel shall not utilize grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. Although not expressly required by the rule, the Committee contemplates that the names of such personnel will generally be furnished to the court before disclosure is made to them. Subparagraph (C) permits disclosure as directed by a court preliminarily to or in connection with a judicial proceeding or, at the request of the defendant, upon a showing that grounds may exist for dismissing the indictment because of matters occurring before the grand jury. Paragraph (3) carries forward the last sentence of current Rule 6(e) with the technical changes recommended by the Supreme Court.

The Rule as redrafted is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions. It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy.

Congressional Modification of Proposed Amendment

Section 2(a) of Pub.L. 95–78 provided in part that the amendment proposed by the Supreme Court [in its order of Apr. 26, 1976] to subdivision (e) of rule 6 of the Federal Rules of Criminal Procedure [subd. (e) of this rule] is approved in a modified form.

Effective Date of 1977 Amendment

Amendment of this rule by order of the United States Supreme Court on Apr. 26, 1976, modified and approved by Pub.L. 95–78, effective Oct. 1, 1977, under section 4 of Pub.L. 95–78.

1979 AMENDMENT

Note to Subdivision (e)(1). Proposed subdivision (e)(1) requires that all proceedings, except when the grand jury is deliberating or voting, be recorded. The existing rule does not require that grand jury proceedings be recorded. The provision in rule 6(d) that "a stenographer or operator of a recording device may be present while the grand jury is in session" has been taken to mean that recordation is permissive and not mandatory; see *United States* v. *Aloisio*, 440 F.2d 705 (7th Cir. 1971), collecting the cases. However, the cases rather frequently state that recordation of the proceedings is the better practice; see *United States* v. *Aloisio*, supra; *United States* v. *Cramer*, 447 F.2d 210 (2d Cir. 1971); *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir. 1967); and some cases require the district court, after a demand, to exercise discretion as to whether the proceedings should be recorded. *United States* v. *Price*, 474 F.2d 1223 (9th Cir. 1973); *United States* v. *Thoresen*, 428 F.2d 654 (9th Cir. 1970). Some district courts have adopted a recording requirement. See, e.g. *United States* v. *Aloisio*, supra; *United States* v. *Gramolini*, 301 F.Supp. 39 (D.R.I. 1969). Recording of grand jury proceedings is currently a requirement in a number of states. See, e.g., Cal. Pen. Code §§ 938–938.3; Iowa Code Ann. § 772.4; Ky. Rev. Stat. Ann. § 28.460; and Ky. R. Crim. P. § 5.16(2).

The assumption underlying the proposal is that the cost of such recording is justified by the contribution made to the improved administration of criminal justice. See *United States* v. *Gramolini*, supra, noting; "Nor can it be claimed that the cost of recordation is prohibitive; in an electronic age, the cost of recordation must be categorized as miniscule." For a discussion of the success of electronic recording in Alaska, see Reynolds, Alaska's Ten Years of Electronic Reporting, 56 A.B.A.J. 1080 (1970).

Among the benefits to be derived from a recordation requirement are the following:

(1) Ensuring that the defendant may impeach a prosecution witness on the basis of his prior inconsistent statements before the grand jury. As noted in the opinion of Oakes, J., in *United States* v. *Cramer:* "First, since *Dennis* v. *United States,* 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), a defendant has been entitled to examine the grand jury testimony of witnesses against him. On this point, the Court was unanimous, holding that there was 'no justification' for the District of Columbia Court of Appeals' 'relying upon [the] "assumption" ' that 'no inconsistencies would have come to light.' The Court's decision was based on the general proposition that '[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts.' In the case at bar the prosecution *did* have exclusive access to the grand jury testimony of the witness Sager, by virtue of being present, and the defense had none—to determine whether there were any inconsistencies with, say, his subsequent testimony as to damaging admissions by the defendant and his attorney Richard Thaler. The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subsequent statements including these admissions as Jencks Act materials. But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury."

(2) Ensuring that the testimony received by the grand jury is trustworthy. In *United States* v. *Cramer,* Oakes, J., also observed: "The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations founded on hearsay or false accusations, all resulting in the indictment of a fellow citizen for a crime."

(3) Restraining prosecutorial abuses before the grand jury. As noted in *United States* v. *Gramolini:* "In no way does recordation inhibit the grand jury's investigation. True, recordation restrains certain prosecutorial practices which might, in its absence be used, but that is no reason not to record. Indeed, a sophisticated prosecutor must acknowledge that there develops between a grand jury and the prosecutor with whom the jury is closeted a rapport—a dependency relationship—which can easily be turned into an instrument of influence on grand jury deliberations. Recordation is the most effective restraint upon such potential abuses."

(4) Supporting the case made by the prosecution at trial. Oakes, J., observed in *United States* v. *Cramer:* "The benefits of having grand jury testimony recorded do not all inure to the defense. See, e.g., *United States* v. *DeSisto,* 329 F.2d 929, 934 (2d Cir.), cert. denied, 377 U.S. 979, 84 S.Ct. 1885, 12 L.Ed.2d 747 (1964) (conviction sustained in part on basis of witnesses's prior sworn testimony before grand jury)." Fed.R.Evid. 801(d)(1)(A) excludes from the category of hearsay the prior inconsistent testimony of a witness given before a grand jury. *United States* v. *Morgan,* 555 F.2d 238 (9th Cir. 1977). See also *United States* v. *Carlson,* 547 F.2d 1346 (8th Cir. 1976), admitting under Fed.R.Evid. 804(b)(5) the grand jury testimony of a witness who refused to testify at trial because of threats by the defendant.

Commentators have also supported a recording requirement. 8 Moore, Federal Practice par. 6.02[2][d] (2d ed. 1972) states: "Fairness to the defendant would seem to compel a change in the practice, particularly in view of the 1970 amendment to 18 U.S.C. § 3500 making grand jury testimony of government witnesses available at trial for purposes of impeachment. The requirement of a record may also prove salutary in controlling overreaching or improper examination of witnesses by the prosecutor." Similarly, 1 Wright, Federal Practice and Procedure—Criminal § 103 (1969), states that the present rule "ought to be changed, either by amendment or by judicial construction. The Supreme Court has emphasized the importance to the defense of access to the transcript of the grand jury proceedings [citing *Dennis*]. A defendant cannot have that advantage if the proceedings go unrecorded." American Bar Association, Report of the Special Committee on Federal Rules of Procedure, 52 F.R.D. 87, 94–95 (1971), renews the committee's 1965 recommendation "that all accusatorial grand jury proceedings either be transcribed by a reporter or recorded by electronic means."

Under proposed subdivision (e)(1), if the failure to record is unintentional, the failure to record would not invalidate subsequent judicial proceedings. Under present law, the failure to compel production of grand jury testimony where there is no record is not reversible error. See *Wyatt* v. *United States,* 388 F.2d 395 (10th Cir. 1968).

The provision that the recording or reporter's notes or any transcript prepared therefrom are to remain in the custody or control (as where the notes are in the immediate possession of a contract reporter employed by the Department of Justice) of the attorney for the government is in accord with present practice. It is specifically recognized, however, that the court in a particular case may have reason to order otherwise.

It must be emphasized that the proposed changes in rule 6(e) deal only with the recording requirement, and in no way expand the circumstances in which disclosure of the grand jury proceedings is permitted or required. "Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means." *United States* v. *Price,* 474 F.2d 1223 (9th Cir. 1973). Specifically, the proposed changes do not provide for copies of the grand jury minutes to defendants as a matter of right, as is the case in some states. See, e.g., Cal. Pen. Code § 938.1; Iowa Code Ann. § 772.4. The matter of disclosure continues to be governed by other provisions, such as rule 16(a) (recorded statements of the defendant), 18 U.S.C. § 3500 (statements of government witnesses), and the unchanged portions of rule 6(e), and the cases interpreting these provisions. See, e.g., *United States* v. *Howard,* 433 F.2d 1 (5th Cir. 1970), and *Beatrice Foods Co.* v. *United States,* 312 F.2d 29 (8th Cir. 1963), concerning the showing which must be made of improper matters occurring before the grand jury before disclosure is required.

Likewise, the proposed changes in rule 6(e) are not intended to make any change regarding whether a defendant may challenge a grand jury indictment. The

Supreme Court has declined to hold that defendants may challenge indictments on the ground that they are not supported by sufficient or competent evidence. *Costello* v. *United States*, 350 U.S. 359 (1956); *Lawn* v. *United States*, 355 U.S. 339 (1958); *United States* v. *Blue*, 384 U.S. 251 (1966). Nor are the changes intended to permit the defendant to challenge the conduct of the attorney for the government before the grand jury absent a preliminary factual showing of serious misconduct.

Note to Subdivision (e)(3)(C). The sentence added to subdivision (e)(3)(C) gives express recognition to the fact that if the court orders disclosure, it may determine the circumstances of the disclosure. For example, if the proceedings are electronically recorded, the court would have discretion in an appropriate case to deny defendant the right to a transcript at government expense. While it takes special skills to make a stenographic record understandable, an electronic recording can be understood by merely listening to it, thus avoiding the expense of transcription.

1983 AMENDMENT

Rule 6(e)(3)(C)

New subdivision (e)(3)(C)(iii) recognizes that it is permissible for the attorney for the government to make disclosure of matters occurring before one grand jury to another federal grand jury. Even absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances. See, e.g., *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Garcia*, 420 F.2d 309 (2d Cir. 1970). In this kind of situation, "[s]ecrecy of grand jury materials should be protected almost as well by the safeguards at the second grand jury proceeding, including the oath of the jurors, as by judicial supervision of the disclosure of such materials." *United States* v. *Malatesta*, 583 F.2d 748 (5th Cir. 1978).

Rule 6(e)(3)(D)

In *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), the Court held on the facts there presented that it was an abuse of discretion for the district judge to order disclosure of grand jury transcripts for use in civil proceedings in another district where that judge had insufficient knowledge of those proceedings to make a determination of the need for disclosure. The Court suggested a "better practice" on those facts, but declared that "procedures to deal with the many variations are best left to the rulemaking procedures established by Congress."

The first sentence of subdivision (e)(3)(D) makes it clear that when disclosure is sought under subdivision (e)(2)(C)(i), the petition is to be filed in the district where the grand jury was convened, whether or not it is the district of the "judicial proceeding" giving rise to the petition. Courts which have addressed the question have generally taken this view, e.g., *Illinois* v. *Sarbaugh*, 522 F.2d 768 (7th Cir. 1977). As stated in *Douglas Oil*,

> those who seek grand jury transcripts have little choice other than to file a request with the court that supervised the grand jury, as it is the only court with control over the transcripts.
>
> Quite apart from the practical necessity, the policies underlying Rule 6(e) dictate that the grand jury's supervisory court participate in reviewing such requests, as it is in the best position to determine the continuing need for grand jury secrecy. Ideally, the judge who supervised the grand jury should review the request for disclosure, as he will have firsthand knowledge of the grand jury's activities. But even other judges of the district where the grand jury sat may be able to discover facts affecting the need for secrecy more easily than would judges from elsewhere around the country. The records are in the custody of the District Court, and therefore are readily available for references. Moreover, the personnel of that court—particularly those of the United States Attorney's Office who worked with the grand jury—are more likely to be informed about the grand jury proceedings than those in a district that had no prior experience with the subject of the request.

The second sentence requires the petitioner to serve notice of his petition upon several persons who, by the third sentence, are recognized as entitled to appear and be heard on the matter. The notice requirement ensures that all interested parties, if they wish, may make a timely appearance. Absent such notice, these persons, who then might only learn of the order made in response to the motion after it was entered, have had to resort to the cumbersome and inefficient procedure of a motion to vacate the order. *In re Special February 1971 Grand Jury* v. *Conlisk*, 490 F.2d 894 (7th Cir. 1973).

Though some authority is to be found that parties to the judicial proceeding giving rise to the motion are not entitled to intervene, in that "the order to produce was not directed to" them, *United States* v. *American Oil Co.*, 456 F.2d 1043, (3d Cir. 1972), that position was rejected in *Douglas Oil*, where it was noted that such persons have standing "to object to the disclosure order, as release of the transcripts to their civil adversaries could result in substantial injury to them." As noted in *Illinois* v. *Sarbaugh*, supra, while present rule 6(e) "omits to state whether any one is entitled to object to disclosure," the rule

> seems to contemplate a proceeding of some kind, judicial proceedings are not normally *ex parte*, and persons in the situation of the intervenors [parties to the civil proceeding] are likely to be the only ones to object to an order for disclosure. If they are not allowed to appear, the advantages of an adversary proceeding are lost.

If the judicial proceeding is a class action, notice to the representative is sufficient.

The amendment also recognizes that the attorney for the government in the district where the grand jury convened also has an interest in the matter and should be allowed to be heard. It may sometimes be the case, as in *Douglas Oil*, that the prosecutor will have relatively little concern for secrecy, at least as compared with certain parties to the civil proceeding. Nonetheless, it is appropriate to recognize that generally the attorney for the government is entitled to be heard so that he may represent what *Douglas Oil* characterizes as "the public interest in secrecy," including the government's legitimate concern about "the possible effect upon the functioning of future grand juries" of unduly liberal disclosure.

The second sentence leaves it to the court to decide whether any other persons should receive notice and be allowed to intervene. This is appropriate, for the necessity for and feasibility of involving others may vary substantially from case to case. In *Douglas Oil*, it was noted that the individual who produced before the grand jury the information now sought has an interest in the matter:

> Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation.

Notice to such persons, however is by no means inevitably necessary, and in some cases the information sought may have reached the grand jury from such a variety of sources that it is not practicable to involve these sources in the disclosure proceeding. Similarly, while *Douglas Oil* notes that rule 6(e) secrecy affords "protection of the innocent accused from disclosure of the accusation made against him before the grand jury," it is appropriate to leave to the court whether that interest requires representation directly by the grand jury target at this time. When deemed necessary to protect the identity of such other persons, it would be a permissible alternative for the government or the court directly to give notice to these other persons, and thus the rule does not foreclose such action.

The notice requirement in the second sentence is inapplicable if the hearing is to be *ex parte*. The legislative history of rule 6(e) states: "It is contemplated that the judicial hearing in connection with an application for a court order by the government, under subparagraph (3)(C)(i) should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy." S.Rep. No. 95–354, 1977 U.S. Code Cong. & Admin. News p. 532. Although such cases are distinguishable from other cases arising under this subdivision because internal regulations limit further disclosure of information disclosed to the government, the rule provides only that the hearing "may" be *ex parte* when the petitioner is the government. This allows the court to decide that matter based upon the circumstances of the particular case. For example, an *ex parte* proceeding is much less likely to be appropriate if the government acts as petitioner as an accommodation to, e.g., a state agency.

Rule 6(e)(3)(E)

Under the first sentence in new subdivision (e)(3)(E), the petitioner or any intervenor might seek to have the matter transferred to the federal district court where the judicial proceeding giving rise to the petition is pending. Usually it will be the petitioner, who is seeking disclosure, who will desire the transfer, but this is not inevitably the case. An intervenor might seek transfer on the ground that the other court, with greater knowledge of the extent of the need, would be less likely to conclude "that the material * * * is needed to avoid a possible injustice" (the test under *Douglas Oil*). The court may transfer on its own motion, for as noted in *Douglas Oil*, if transfer is the better course of action it should not be foreclosed "merely because the parties have failed to specify the relief to which they are entitled."

It must be emphasized that transfer is proper only if the proceeding giving rise to the petition "is in federal district court in another district." If, for example, the proceeding is located in another district but is at the state level, a situation encompassed within rule 6(e)(3)(C)(i), *In re Special February 1971 Grand Jury* v. *Conlisk*, supra, there is no occasion to transfer. Ultimate resolution of the matter cannot be placed in the hands of the state court, and in such a case the federal court in that place would lack what *Douglas Oil* recognizes as the benefit to be derived from transfer: "first-hand knowledge of the litigation in which the transcripts allegedly are needed." Formal transfer is unnecessary in intradistrict cases, even when the grand jury court and judicial proceeding court are not in the same division.

As stated in the first sentence, transfer by the court is appropriate "unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper." (As reflected by the "whether disclosure is proper" language, the amendment makes no effort to define the disclosure standard; that matter is currently governed by *Douglas Oil* and the authorities cited therein, and is best left to elaboration by future case law.) The amendment expresses a preference for having the disclosure issue decided by the grand jury court. Yet, it must be recognized, as stated in *Douglas Oil*, that often this will not be possible because

> the judges of the court having custody of the grand jury transcripts will have no first-hand knowledge of the litigation in which the transcripts allegedly are needed, and no practical means by which such knowledge can be obtained. In such a case, a judge in the district of the grand jury cannot weigh in an informed manner the need for disclosure against the need for maintaining grand jury secrecy.

The penultimate sentence provides that upon transfer the transferring court shall order transmitted the material sought to be disclosed and also a written evaluation of the need for continuing grand jury secrecy. Because the transferring court is in the best position to assess the interest in continued grand jury secrecy in the particular instance, it is important that the court which will now have to balance that interest against the need for disclosure receive the benefit of the transferring court's assessment. Transmittal of the material sought to be disclosed will not only facilitate timely disclosure if it is thereafter ordered, but will also assist the other court in deciding how great the need for disclosure actually is. For example, with that material at hand the other court will be able to determine if there is any inconsistency between certain grand jury testimony and testimony received in the other judicial proceeding. The rule recognizes, however, that there may be instances in which transfer of everything sought to be disclosed is not feasible. See, e.g., *In re 1975–2 Grand Jury Investigation*, 566 F.2d 1293 (5th Cir. 1978) (court ordered transmittal of "an inventory of the grand jury subpoenas, transcripts, and documents," as the materials in question were "exceedingly voluminous, filling no less than 55 large file boxes and one metal filing cabinet").

The last sentence makes it clear that in a case in which the matter is transferred to another court, that court should permit the various interested parties specified in the rule to be heard. Even if those persons were previously heard before the court which ordered the transfer, this will not suffice. The order of transfer did not decide the ultimate issue of "whether a particularized need for disclosure outweighs the interest in continued grand jury secrecy," *Douglas Oil*, supra, which is what now remains to be resolved by the court to which transfer was made. Cf. *In re 1975-2 Grand Jury Investigation*, supra, holding that a transfer order is not appealable because it does not determine the ultimate question of disclosure, and thus "[n]o one has yet been aggrieved and no one will become aggrieved until [the court to which the matter was transferred] acts."

Rule 6(e)(5)

This addition to rule 6 would make it clear that certain hearings which would reveal matters which have previously occurred before a grand jury or are likely to occur before a grand jury with respect to a pending or ongoing investigation must be conducted in camera in whole or in part in order to prevent public disclosure of such secret information. One such hearing is that conducted under subdivision (e)(3)(D), for it will at least sometimes be necessary to consider and assess some of the "matters occurring before the grand jury" in order to decide the disclosure issue. Two other kinds of hearings at which information about a particular grand jury investigation might need to be discussed are those at which the question is whether to grant a grand jury witness immunity or whether to order a grand jury witness to comply fully with the terms of a subpoena directed to him.

A recent GAO study established that there is considerable variety in the practice as to whether such hearings are closed or open, and that open hearings often seriously jeopardize grand jury secrecy:

> For judges to decide these matters, the witness' relationship to the case under investigation must be discussed. Accordingly, the identities of witnesses and targets, the nature of expected testimony, and the extent to which the witness is cooperating are often revealed during preindictment proceedings. Because the matters discussed can compromise the purposes of grand jury secrecy, some judges close the preindictment proceedings to the public and the press; others do not. When the proceeding is open, information that may otherwise be kept secret under rule 6(e) becomes available to the public and the press....
>
> Open preindictment proceedings are a major source of information which can compromise the purposes of grand jury secrecy. In 25 cases we were able to establish links between open proceedings and later newspaper articles containing information about the identities of witnesses and targets and the nature of grand jury investigations.

Comptroller General, More Guidance and Supervision Needed over Federal Grand Jury Proceedings 8–9 (Oct. 16, 1980).

The provisions of rule 6(e)(5) do not violate any constitutional right of the public or media to attend such pretrial hearings. There is no Sixth Amendment right in the public to attend pretrial proceedings, *Gannett Co., Inc.* v. *DePasquale*, 443 U.S. 368 (1979), and *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, (1980), only recognizes a First Amendment "right to attend criminal trials." *Richmond Newspapers* was based largely upon the "unbroken, uncontradicted history" of public trials, while in *Gannett* it was noted "there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings." Moreover, even assuming some public right to attend certain pretrial proceedings, see *United States* v. *Criden*, 675 F.2d 550 (3d Cir. 1982), that right is not absolute; it must give way, as stated in *Richmond Newspapers*, to "an overriding interest" in a particular case in favor of a closed proceeding. By permitting closure only "to the extent necessary to prevent disclosure of matters occurring before a grand jury," rule 6(e)(5) recognizes the longstanding interest in the secrecy of grand jury proceedings. Counsel or others allowed to be present at the closed hearing may be put under a protective order by the court.

Subdivision (e)(5) is expressly made "subject to any right to an open hearing in contempt proceedings." This will accommodate any First Amendment right which might be deemed applicable in that context because of the proceedings' similarities to a criminal trial, cf. *United States* v. *Criden*, supra, and also any Fifth or Sixth Amendment right of the contemnor. The latter right clearly exists as to a criminal contempt proceeding, *In re Oliver*, 333 U.S. 257 (1948), and some authority is to be found recognizing such a right in civil contempt proceedings as well. *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982). This right of the contemnor must be requested by him and, in any event, does not require that the entire contempt proceedings, including recitation of the substance of the questions he has refused to answer, be public. *Levine* v. *United States*, 362 U.S. 610 (1960).

Rule 6(e)(6)

Subdivision (e)(6) provides that records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for so long as is necessary to prevent disclosure of matters occurring before a grand jury. By permitting such documents as grand jury subpoenas and immunity orders to be kept under seal, this provision addresses a serious problem of grand jury secrecy and expressly authorizes a procedure now in use in many but not all districts. As reported in Comptroller General, More Guidance and Supervision Needed over Federal Grand Jury Proceedings 10, 14 (Oct. 16, 1980):

> In 262 cases, documents presented at open preindictment proceedings and filed in public files revealed details of grand jury investigations. These documents are, of course, available to anyone who wants them, including targets of investigations. [There are] two documents commonly found in public files which usually reveal the identities of witnesses and targets. The first document is a Department of Justice authorization to a U.S. attorney to apply to the court for a grant of immunity for a witness. The second document is the court's order granting the witness immunity from prosecution and compelling him to testify and produce requested information. * * *

Subpoenas are the fundamental documents used during a grand jury's investigation because through subpoenas, grand juries can require witnesses to testify and produce documentary evidence for their consideration. Subpoenas can identify witnesses, potential targets, and the nature of an investigation. Rule 6(e) does not provide specific guidance on whether a grand jury's subpoena should be kept secret. Additionally, case law has not consistently stated whether the subpoenas are protected by rule 6(e).

District courts still have different opinions about whether grand jury subpoenas should be kept secret. Out of 40 Federal District Courts we contacted, 36 consider these documents to be secret. However, 4 districts do make them available to the public.

Rule 6(g)

In its present form, subdivision 6(g) permits a grand jury to serve no more than 18 months after its members have been sworn, and absolutely no exceptions are permitted. (By comparison, under the Organized Crime Control Act of 1970, Title I, 18 U.S.C. §§ 3331–3334, special grand juries may be extended beyond their basic terms of 18 months if their business has not been completed.) The purpose of the amendment is to permit some degree of flexibility as to the discharge of grand juries where the public interest would be served by an extension.

As noted in *United States* v. *Fein*, 504 F.2d 1170 (2d Cir. 1974), upholding the dismissal of an indictment returned 9 days after the expiration of the 18-month period but during an attempted extension, under the present inflexible rule "it may well be that criminal proceedings which would be in the public interest will be frustrated and that those who might be found guilty will escape trial and conviction." The present inflexible rule can produce several undesirable consequences, especially when complex fraud, organized crime, tax or antitrust cases are under investigation: (i) wastage of a significant amount of time and resources by the necessity of presenting the case once again to a successor grand jury simply because the matter could not be concluded before the term of the first grand jury expired; (ii) precipitous action to conclude the investigation before the expiration date of the grand jury; and (iii) potential defendants may be kept under investigation for a longer time because of the necessity to present the matter again to another grand jury.

The amendment to subdivision 6(g) permits extension of a regular grand jury only "upon a determination that such extension is in the public interest." This permits some flexibility, but reflects the fact that extension of regular grand juries beyond 18 months is to be the exception and not the norm. The intention of the amendment is to make it possible for a grand jury to have sufficient extra time to wind up an investigation when, for example, such extension becomes necessary because of the unusual nature of the case or unforeseen developments.

Because terms of court have been abolished, 28 U.S.C. § 138, the second sentence of subdivision 6(g) has been deleted.

Rule 7. The Indictment and the Information

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Criminal Forfeiture. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a

bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. This rule gives effect to the following provision of the Fifth Amendment to the Constitution of the United States: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *". An infamous crime has been defined as a crime punishable by death or by imprisonment in a penitentiary or at hard labor, *Ex parte Wilson*, 114 U.S. 417, 427, 5 S.Ct. 935, 29 L.Ed. 89; *United States v. Moreland*, 258 U.S. 433, 42 S.Ct. 368, 66 L.Ed. 700, 24 A.L.R. 992. Any sentence of imprisonment for a term of over one year may be served in a penitentiary, if so directed by the Attorney General, 18 U.S.C. former § 753f (now §§ 4082, 4083) (Commitment of persons by any court of the United States and the juvenile court of the District of Columbia; place of confinement; transfers). Consequently any offense punishable by imprisonment for a term of over one year is an infamous crime.

2. Petty offenses and misdemeanors for which no infamous punishment is prescribed may now be prosecuted by information, 18 U.S.C. former § 541 (now § 1) (Felonies and misdemeanors); *Duke* v. *United States*, 301 U.S. 492, 57 S.Ct. 835, 81 L.Ed. 1243.

3. For a discussion of the provision for waiver of indictment, see Note to Rule 7(b), infra.

4. Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts.

Note to Subdivision (b). 1. Opportunity to waive indictment and to consent to prosecution by information will be a substantial aid to defendants, especially those who, because of inability to give bail, are incarcerated pending action of the grand jury, but desire to plead guilty. This rule is particularly important in those districts in which considerable intervals occur between sessions of the grand jury. In many districts where the grand jury meets infrequently a defendant unable to give bail and desiring to plead guilty is compelled to spend many days, and sometimes many weeks, and even months, in jail before he can begin the service of his sentence, whatever it may be, awaiting the action of a grand jury. Homer Cummings, 29 A.B.A.Jour. 654–655; Vanderbilt, 29 A.B.A.Jour. 376, 377; Robinson, 27 Jour. of the Am. Judicature Soc. 38, 45; Medalie, 4 Lawyers Guild R. (3)1, 3. The rule contains safeguards against improvident waivers.

The Judicial Conference of Senior Circuit Judges, in September 1941, recommended that "existing law or established procedure be so changed, that a defendant may waive indictment and plead guilty to an information filed by a United States attorney in all cases except capital felonies." Report of the Judicial Conference of Senior Circuit Judges (1941) 13. In September 1942 the Judicial Conference recommended that provision be made "for waiver of indictment and jury trial, so that persons accused of crime may not be held in jail needlessly pending trial." Id. (1942) 8.

Attorneys General of the United States have from time to time recommended legislation to permit defendants to waive indictment and to consent to prosecution by information. See Annual Report of the Attorney General of the United States (Mitchell) (1931) 3; Id. (Mitchell) (1932) 6; Id. (Cummings) (1933) 1, (1936) 2, (1937) 11, (1938) 9; Id. (Murphy) (1939) 7.

The Federal Juvenile Delinquency Act, 18 U.S.C. former §§ 921–929 (now §§ 5031, 5037), now permits a juvenile charged with an offense not punishable by death or life imprisonment to consent to prosecution by information on a charge of juvenile delinquency, 18 U.S.C. former § 922 (now §§ 5032, 5033).

2. On the constitutionality of this rule, see *United States* v. *Gill*, 55 F.2d 399, D.N.M., holding that the constitutional guaranty of indictment by grand jury may be waived by defendant. It has also been held that other constitutional guaranties may be waived by the defendant, e.g., *Patton* v. *United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263 (trial by jury); *Johnson* v. *Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357 (right of counsel); *Trono* v. *United States*, 199 U.S. 521, 534, 26 S.Ct. 121, 50 L.Ed. 292, 4 Ann.Cas. 773 (protection against double jeopardy); *United States* v. *Murdock*, 284 U.S. 141, 148, 52 S.Ct. 63, 76 L.Ed. 210, 82 A.L.R. 1376 (privilege against self-incrimination); *Diaz* v. *United States*, 223 U.S. 442, 450, 32 S.Ct. 250, 56 L.Ed. 500, Ann.Cas.1913C, 1138 (right of confrontation).

Note to Subdivision (c). 1. This rule introduces a simple form of indictment, illustrated by Forms 1 to 11 in the Appendix of Forms. Cf. Rule 8(a) of the Federal Rules of Civil Procedure, 28 U.S.C. following § 2072. For discussion of the effect of this rule and a comparison between the present form of indictment and the simple form introduced by this rule, see Vanderbilt, 29 A.B.A. Jour. 376, 377; Homer Cummings, 29 A.B.A. Jour. 654, 655; Holtzoff, 3 F.R.D. 445, 448–449; Holtzoff, 12 Geo. Washington L.R. 119, 123–126; Medalie, 4 Lawyers Guild R. (3)1, 3.

2. The provision contained in the fifth sentence that it may be alleged in a single count that the means by which the defendant committed the offense are unknown, or that he committed it by one or more specified means, is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways. Cf. Federal Rules of Civil Procedure, Rule 8(e)(2), 28 U.S.C., Appendix.

3. The law at present regards citations to statutes or regulations as not a part of the indictment. A conviction may be sustained on the basis of a statute or regulation other than that cited. *Williams* v. *United States*, 168 U.S. 382, 389, 18 S.Ct. 92, 42 L.Ed. 509; *United States* v. *Hutcheson*, 312 U.S. 219, 229, 61 S.Ct. 463, 85 L.Ed. 788. The provision of the rule, in view of the many statutes and regulations, is for the benefit of the defendant and is not intended to cause a dismissal of the indictment, but simply to provide a means by which he can be properly informed without danger to the prosecution.

Note to Subdivision (d). This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial. The authority of the court to strike such surplusage is to be limited to doing so on defendant's motion, in the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended, *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849. By making such a motion, the defendant would, however, waive his rights in this respect.

Note to Subdivision (e). This rule continues the existing law that, unlike an indictment, an information may be amended, *Muncy* v. *United States*, 289 Fed. 780, C.C.A. 4th.

Note to Subdivision (f). This rule is substantially a restatement of existing law on bills of particulars.

1966 AMENDMENT

The amendment to the first sentence eliminating the requirement of a showing of cause is designed to encourage a more liberal attitude by the courts toward bills of particulars without taking away the discretion which courts must have in dealing with such motions in individual cases. For an illustration of wise use of this discretion see the opinion by Justice Whittaker written when he was a district judge in *United States* v. *Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

The amendment to the second sentence gives discretion to the court to permit late filing of motions for bills of particulars in meritorious cases. Use of late motions for the purpose of delaying trial should not, of course, be permitted. The courts have not been agreed as to their power to accept late motions in the absence of a local rule or a previous order. See *United States* v. *Miller*, 217 F.Supp. 760 (E.D. Pa. 1963); *United States* v. *Taylor*, 25 F.R.D. 225 (E.D. N.Y. 1960); *United States* v. *Sterling*, 122 F.Supp. 81 (E.D. Pa. 1954) (all taking a limited view of the power of the court). But cf. *United States* v. *Brown*, 179 F.Supp. 893 (E.D. N.Y. 1959) (exercising discretion to permit an out of time motion).

1972 AMENDMENT

Subdivision (c)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2).

The Congress viewed the provisions of the Organized Crime Control Act of 1970 as reestablishing a limited common law criminal forfeiture. S. Rep. No. 91-617, 91st Cong., 1st Sess. 79-80 (1969). The legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 indicates a congressional purpose to have similar procedures apply to the forfeiture of profits or interests under that act. H. Rep. No. 91-1444 (part I), 91st Cong., 2d Sess. 81-85 (1970).

Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. Subdivision (c)(2) provides for notice. Changes in rules 31 and 32 provide for a special jury finding and for a judgment authorizing the Attorney General to seize the interest or property forfeited.

1979 AMENDMENT

The amendment to rule 7(c)(2) is intended to clarify its meaning. Subdivision (c)(2) was added in 1972, and, as noted in the Advisory Committee Note thereto, was "intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2)." These provisions reestablished a limited common law criminal forfeiture, necessitating the addition of subdivision (c)(2) and corresponding changes in rules 31 and 32, for at common law the defendant in a criminal forfeiture proceeding was entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.

Although there is some doubt as to what forfeitures should be characterized as "punitive" rather than "remedial," see Note, 62 Cornell L.Rev. 768 (1977), subdivision (c)(2) is intended to apply to those forfeitures which are criminal in the sense that they result from a special verdict under rule 31(e) and a judgment under rule 32(b)(2), and not to those resulting from a separate in rem proceeding. Because some confusion in this regard has resulted from the present wording of subdivision (c)(2), *United States* v. *Hall*, 521 F.2d 406 (9th Cir. 1975), a clarifying amendment is in order.

Rule 8. Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is substantially a restatement of existing law, 18 U.S.C. former § 557 (Indictments and presentments; joinder of charges).

Note to Subdivision (b). The first sentence of the rule is substantially a restatement of existing law, 9 Edmunds, Cyclopedia of Federal Procedure, 2d Ed., 4116. The second sentence formulates a practice now approved in some circuits. *Caringella* v. *United States*, 78 F.2d 563, 567, C.C.A.7th.

Rule 9. Warrant or Summons Upon Indictment or Information

(a) Issuance. Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of Rule 5.

(b) Form.

(1) Warrant. The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(c) Execution or Service; and Return.

(1) Execution or Service. The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

(2) Return. The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

[(d) Remand to United States Magistrate for Trial of Minor Offenses] (Abrogated Apr. 28, 1982, eff. Aug. 1, 1982).

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94–64, § 3(4), 89 Stat. 370; Dec. 12, 1975, Pub.L. 94–149, § 5, 89 Stat. 806; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1982, eff. Aug. 1, 1982.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. See Note to Rule 4, supra.

2. The provision of Rule 9(a) that a warrant may be issued on the basis of an information only if the latter is supported by oath is necessitated by the Fourth Amendment to the Constitution of the United States. See *Albrecht* v. *United States*, 273 U.S. 1, 5, 47 S.Ct. 250, 71 L.Ed. 505.

3. The provision of Rule 9(b)(1) that the amount of bail may be fixed by the court and endorsed on the warrant states a practice now prevailing in many districts and is intended to facilitate the giving of bail by the defendant and eliminate delays between the arrest and the giving of bail, which might ensue if bail cannot be fixed until after arrest.

1972 AMENDMENT

Subdivision (b) is amended to make clear that the person arrested shall be brought before a United States magistrate if the information or indictment charges a "minor offense" triable by the United States magistrate.

Subdivision (c) is amended to reflect the office of United States magistrate.

Subdivision (d) is new. It provides for a remand to the United States magistrate of cases in which the person is charged with a "minor offense." The magistrate can then proceed in accordance with rule 5 to try the case if the right to trial before a judge of the district court is waived.

1974 AMENDMENT

Rule 9 is revised to give high priority to the issuance of a summons unless a "valid reason" is given for the issuance of an arrest warrant. See a comparable provision in rule 4.

Under the rule, a summons will issue by the clerk unless the attorney for the government presents a valid reason for the issuance of an arrest warrant. Under the old rule, it has been argued that the court must issue an arrest warrant if one is desired by the attorney for the government. See authorities listed in Frankel, Bench

Warrants Upon the Prosecutor's Demand: A View From the Bench, 71 Colum.L.Rev. 403, 410 n. 25 (1971). For an expression of the view that this is undesirable policy, see Frankel, *supra*, pp. 410–415.

A summons may issue if there is an information supported by oath. The indictment itself is sufficient to establish the existence of probable cause. See C. Wright, Federal Practice and Procedure: Criminal § 151 (1969); 8 J. Moore, Federal Practice ¶ 9.02[2] at p. 9–4 (2d ed.) Cipes (1969); *Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). This is not necessarily true in the case of an information. See C. Wright, *supra*, § 151; 8 J. Moore, *supra*, ¶ 9.02. If the government requests a warrant rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 9 of the Federal Rules of Criminal Procedure is closely related to Rule 4. Rule 9 deals with arrest procedures after an information has been filed or an indictment returned. The present rule gives the prosecutor the authority to decide whether a summons or a warrant shall issue.

The Supreme Court's amendments to Rule 9 parallel its amendments to Rule 4. The basic change made in Rule 4 is also made in Rule 9.

B. Committee Action. For the reasons set forth above in connection with Rule 4, the Committee endorses and accepts the basic change in Rule 9. The Committee made changes in Rule 9 similar to the changes it made in Rule 4.

1975 AMENDMENT

Subd. (b)(1). Pub.L. 94–149 substituted reference to "rule 4(c)(1)" for "rule 4(b)(1)".

Subd. (c)(1). Pub.L. 94–149 substituted reference to "rule 4(d)(1), (2), and (3)" for "rule 4(c)(1), (2), and (3)".

1979 AMENDMENT

Subdivision (a) is amended to make explicit the fact that a warrant may issue upon the basis of an information only if the information or an affidavit filed with the information shows probable cause for the arrest. This has generally been assumed to be the state of the law even though not specifically set out in rule 9; see C. Wright, Federal Practice and Procedure: Criminal § 151 (1969); 8 J. Moore, Federal Practice par. 9.02[2] (2d ed. 1976).

In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Supreme Court rejected the contention "that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial," commenting:

> Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of [such] procedure. In *Albrecht* v. *United States*, 273 U.S. 1, 5, 47 S.Ct. 250, 251, 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.

No change is made in the rule with respect to warrants issuing upon indictments. In *Gerstein*, the Court indicated it was not disturbing the prior rule that "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." See *Ex parte United States*, 287 U.S. 241, 250 (1932).

The provision to the effect that a summons shall issue "by direction of the court" has been eliminated because it conflicts with the first sentence of the rule, which states that a warrant "shall" issue when requested by the attorney for the government, if properly supported. However, an addition has been made providing that if the attorney for the government does not make a request for either a warrant or summons, then the court may in its discretion issue either one. Other stylistic changes ensure greater consistency with comparable provisions in rule 4.

1982 AMENDMENT

The amendment of subdivision (a), by reference to Rule 5, clarifies what is to be done once the defendant is brought before the magistrate. This means, among other things, that no preliminary hearing is to be held in a Rule 9 case, as Rule 5(c) provides that no such hearing is to be had "if the defendant is indicted or if an information against the defendant is filed."

The amendment of subdivision (b) conforms Rule 9 to the comparable provisions in Rule 4(c)(1) and (2).

The amendment of subdivision (c) conforms Rule 9 to the comparable provisions in Rules 4(d)(4) and 5(a) concerning return of the warrant.

This subdivision (d), incorrect in its present form in light of the recent amendment of 18 U.S.C. § 3401(a), has been abrogated as unnecessary in light of the change to subdivision (a).

IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

NOTES OF ADVISORY COMMITTEE ON RULES

1. The first sentence states the prevailing practice.

2. The requirement that the defendant shall be given a copy of the indictment or information before he is called upon to plead, contained in the second sentence, is new.

3. Failure to comply with arraignment requirements has been held not to be jurisdictional, but a mere technical irregularity not warranting a reversal of a conviction, if not raised before trial, *Garland* v. *State of Washington*, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772.

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(5)-(10), 89 Stat. 371, 372; Apr. 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is substantially a restatement of existing law and practice, 18 U.S.C. former § 564 (Standing mute); *Fogus* v. *United States*, 34 F.2d 97, C.C.A.4th (duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of nolo contendere has always existed in the Federal courts, *Hudson* v. *United States*, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347; *United States* v. *Norris*, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076. The use of the plea is recognized by the Probation Act, 18 U.S.C. former § 724 (now § 3651). While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

1966 AMENDMENT

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. See United States Attorneys Statistical Report, Fiscal Year 1964, p. 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change express-

ly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States* v. *Diggs*, 304 F.2d 929 (6th Cir. 1962); *Domenica* v. *United States*, 292 F.2d 483 (1st Cir. 1961); *Gundlach* v. *United States*, 262 F.2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and *Julian* v. *United States*, 236 F.2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks* v. *United States*, 298 F.2d 204 (5th Cir. 1962); *Nunley* v. *United States*, 294 F.2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and *United States* v. *Von der Heide*, 169 F.Supp. 560 (D.D.C. 1959).

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See, e.g., *Von Moltke* v. *Gillies*, 332 U.S. 708, 724 (1948); *Kerchevel* v. *United States*, 274 U.S. 220, 223 (1927); *Munich* v. *United States*, 337 F.2d 356 (9th Cir. 1964); *Pilkington* v. *United States*, 315 F.2d 204 (4th Cir. 1963); *Smith* v. *United States*, 324 F.2d 436 (D.C. Cir. 1963); but cf. *Marvel* v. *United States*, 335 F.2d 101 (5th Cir. 1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich. Stat. Ann. § 28.1058 (1954); Mich. Sup. Ct. Rule 35A; *In re Valle*, 364 Mich. 471, 110 N.W.2d 673 (1961); *People* v. *Barrows*, 358 Mich. 267, 99 N.W.2d 347 (1959); *People* v. *Bumpus*, 355 Mich. 374, 94 N.W.2d 854 (1959); *People* v. *Coates*, 337 Mich. 56, 59 N.W.2d 83 (1953). See also *Stinson* v. *United States*, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea. The new third sentence is not, therefore, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See e.g., *Lott* v. *United States*, 367 U.S. 421, 426 (1961).

1974 AMENDMENT

The amendments to rule 11 are designed to achieve two principal objectives:

(1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.

(2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.

Other less basic changes are also made. The changes are discussed in the order in which they appear in the rule.

Subdivision (b) retains the requirement that the defendant obtain the consent of the court in order to plead nolo contendere. It adds that the court shall, in deciding whether to accept the plea, consider the views of the prosecution and of the defense and also the larger public interest in the administration of criminal justice.

Although the plea of nolo contendere has long existed in the federal courts, *Hudson* v. *United States*, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347 (1926), the desirability of the plea has been a subject of disagreement. Compare Lane-Reticker, Nolo Contendere in North Carolina, 34 N.C.L.Rev. 280, 290–291 (1956), with Note. The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb.L.Rev. 428, 434 (1954), favoring the plea. The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the nolo plea is not strong enough to justify a minimum standard supporting its use," but because "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe use of the plea. ABA, Standards Relating to Pleas of Guilty § 1.1(a) Commentary at 16 (Approved Draft, 1968).

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. See discussion of the history of the nolo plea in North Carolina v. Alford, 400 U.S. 25, 35–36 n. 8, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Note, The Nature and Consequences of the Plea of Nolo Contendere, 33 Neb.L.Rev. 428, 430 (1954). A judgment upon the plea is a conviction and may be used to apply multiple offender statutes. Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255, 1265 (1942). Unlike a plea of guilty, however, it cannot be used against a defendant as an admission in a subsequent criminal or civil case. 4 Wigmore § 1066(4), at 58 (3d ed. 1940, Supp. 1970); Rules of Evidence for United States Courts and Magistrates, rule 803(22) (Nov. 1971). See Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, 51 Yale L.J. 1255 (1942); ABA Standards Relating to Pleas of Guilty §§ 1.1(a) and (b), Commentary at 15–18 (Approved Draft, 1968).

The factors considered relevant by particular courts in determining whether to permit the plea of nolo contendere vary. Compare *United States* v. *Bagliore*, 182 F.Supp. 714, 716 (E.D.N.Y. 1960), where the view is taken that the plea should be rejected unless a compelling reason for acceptance is established, with *United States* v. *Jones*, 119 F.Supp. 288, 290 (S.D.Cal.1954), where the view is taken that the plea should be accepted in the absence of a compelling reason to the contrary.

A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea of nolo contendere because it wants a definite resolution of the defendant's guilt or innocence either for correctional

purposes or for reasons of subsequent litigation. ABA Standards Relating to Pleas of Guilty § 1.1(b) Commentary at 16–18 (Approved Draft, 1968). Under subdivision (b) of the new rule the balancing of the interests is left to the trial judge, who is mandated to take into account the larger public interest in the effective administration of justice.

Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin* v. *Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

Subdivision (c) retains the requirement that the court address the defendant personally. See *McCarthy* v. *United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). There is also an amendment to rule 43 to make clear that a defendant must be in court at the time of the plea.

Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement. See ABA Standards Relating to Pleas of Guilty § 1.4(a) (Approved Draft, 1968); Illinois Supreme Court Rule 402(a)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(a)(1). The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants. Thompson, The Judge's Responsibility on a Plea of Guilty 62 W.Va.L.Rev. 213, 220 (1960); Resolution of Judges of U.S. District Court for D.C., June 24, 1959.

Former rule 11 required the court to inform the defendant of the "consequences of the plea." Subdivision (c)(2) changes this and requires instead that the court inform the defendant of and determine that he understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered." The objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty.

It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty. *Durant* v. *United States*, 410 F.2d 689 (1st Cir. 1969), held that a defendant must be informed of his ineligibility for parole. *Trujillo* v. *United States*, 377 F.2d 266 (5th Cir. 1967), cert. denied 389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221 (1967), held that advice about eligibility for parole is not required. It has been suggested that a defendant be advised that a jury might find him guilty only of a lesser included offense. C. Wright, Federal Practice and Procedure: Criminal § 173 at 374 (1969). See contra Dorrough v. United States, 385 F.2d 887 (5th Cir. 1967). The ABA Standards Relating to Pleas of Guilty § 1.4(c)(iii) (Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.

Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant. Currently, certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant. For example, the judge may impose a sentence under 18 U.S.C. § 4202 making the defendant eligible for parole when he has served one third of the judicially imposed maximum; or, under 18 U.S.C. § 4208(a)(1), making parole eligibility after a specified period of time less than one third of the maximum; or, under 18 U.S.C. § 4208(a)(2), leaving eligibility to the discretion of the parole board. At the time the judge is required to advise the defendant of the consequences of his plea, the judge will usually not have seen the presentence report and thus will have no basis for giving a defendant any very realistic advice as to when he might be eligible for parole. Similar complications exist with regard to other, particularly collateral, consequences of a plea of guilty in a given case.

Subdivisions (c)(3) and (4) specify the constitutional rights that the defendant waives by a plea of guilty or nolo contendere. These subdivisions are designed to satisfy the requirements of understanding waiver set forth in *Boykin* v. *Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Subdivision (c)(3) is intended to require that the judge inform the defendant and determine that he understands that he waives his fifth amendment rights. The rule takes the position that the defendant's right not to incriminate himself is best explained in terms of his right to plead not guilty and to persist in that plea if it has already been made. This is language identical to that adopted in Illinois for the same purpose. See Illinois Supreme Court Rule 402(a)(3) (1970), Ill. Rev.Stat. 1973, ch. 110A, § 402(a)(3).

Subdivision (c)(4) assumes that a defendant's right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers are best explained by indicating that the right to trial is waived. Specifying that there will be no future trial of any kind makes this fact clear to those defendants who, though knowing they have waived trial by jury, are under the mistaken impression that some kind of trial will follow. Illinois has recently adopted similar language. Illinois Supreme Court Rule 402(a)(4) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(a)(4). In explaining to a defendant that he waives his right to trial, the judge may want to explain some of the aspects of trial such as the right to confront witnesses, to subpoena witnesses, to testify in his own behalf, or, if he chooses, not to testify. What is required, in this

respect, to conform to *Boykin* is left to future case-law development.

Subdivision (d) retains the requirement that the court determine that a plea of guilty or nolo contendere is voluntary before accepting it. It adds the requirement that the court also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior plea discussions between the attorney for the government and the defendant or his attorney. See *Santobello* v. *New York*, 404 U.S. 257, 261–262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971): "The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." Subdivisions (d) and (e) afford the court adequate basis for rejecting an improper plea agreement induced by threats or inappropriate promises.

The new rule specifies that the court personally address the defendant in determining the voluntariness of the plea.

By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack. * * * Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. *McCarthy* v. *United States*, 394 U.S. 459, 466, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

Subdivision (e) provides a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements provided that they are disclosed in open court and subject to acceptance or rejection by the trial judge.

Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA Standards Relating to Pleas of Guilty, pp. 1–2 (Approved Draft, 1968). A substantial number of these are the result of plea discussions. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966); L. Weinreb, Criminal Process 437 (1969); Note, Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964).

There is increasing acknowledgement of both the inevitability and the propriety of plea agreements. See, e.g., ABA Standards Relating to Pleas of Guilty § 3.1 (Approved Draft, 1968); Illinois Supreme Court Rule 402 (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402.

In *Brady* v. *United States*, 397 U.S. 742, 752–753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the court said:

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

In *Santobello* v. *New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971), the court said:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged.

Administratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions. See, e.g., President's Commission on Law Enforcement and Administration of Justice, Task Force Report. The Courts 9 (1967); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964). But expediency is not the basis for recognizing the propriety of a plea agreement practice. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the criminal law. *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. This is the conclusion reached in the ABA Standards Relating to Pleas of Guilty § 1.8 (Approved Draft, 1968); the ABA Standards Relating to The Prosecution Function and The Defense Function pp. 243–253 (Approved Draft, 1971); and the ABA Standards Relating to the Function of the Trial Judge, § 4.1 (App.Draft, 1972). The Supreme Court of California recently recognized the propriety of plea bargaining. See *People* v. *West*, 3 Cal.3d 595, 91 Cal. Rptr. 385, 477 P.2d 409 (1970). A plea agreement procedure has recently been decided in the District of Columbia Court of General Sessions upon the recommendation of the United States Attorney. See 51 F.R.D. 109 (1971).

Where the defendant by his plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. Cf. Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204, 211 (1956). Where the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct, it has been thought proper to recognize this in sentencing. See also ALI, Model Penal Code § 7.01 (P.O.D. 1962); NPPA Guides for Sentencing (1957). Granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion, particularly where the facts of a case do not warrant the harsh consequences of a long mandatory sentence or collateral consequences which are unduly severe. A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination.

Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, chs. 2 and 3 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 881 (1964).

Where plea discussions and agreements are viewed as proper, it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge.

We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to

destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record [The Bench Book prepared by the Federal Judicial Center for use by United States District Judges now suggests that the defendant be asked by the court "if he believes there is any understanding or if any predictions have been made to him concerning the sentence he will receive." Bench Book for United States District Judges, Federal Judicial Center (1969) at 1.05.3.] and publicly disclosed. *United States* v. *Williams*, 407 F.2d 940 (4th Cir. 1969). * * * In the future we think that the district judges should not only make the general inquiry under Rule 11 as to whether the plea of guilty has been coerced or induced by promises, but should specifically inquire of counsel whether plea bargaining has occurred. Logically the general inquiry should elicit information about plea bargaining, but it seldom has in the past. *Raines* v. *United States*, 423 F.2d 526, 530 (4th Cir. 1970).

In the past, plea discussions and agreements have occurred in an informal and largely invisible manner. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115 (1967). There has often been a ritual of denial that any promises have been made, a ritual in which judges, prosecutors, and defense counsel have participated. ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60–69 (Approved Draft 1968); Task Force Report: The Courts 9. Consequently, there has been a lack of effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness. See ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60 et seq.; Task Force Report: The Courts 9–13.

The procedure described in subdivision (e) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Subdivision (e)(1) specifies that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may" participate in plea discussions. The inclusion of "the defendant when acting pro se" is intended to reflect the fact that there are situations in which a defendant insists upon representing himself. It may be desirable that an attorney for the government not enter plea discussions with a defendant personally. If necessary, counsel can be appointed for purposes of plea discussions. (Subdivision (d) makes it mandatory that the court inquire of the defendant whether his plea is the result of plea discussions between him and the attorney for the government. This is intended to enable the court to reject an agreement reached by an unrepresented defendant unless the court is satisfied that acceptance of the agreement adequately protects the rights of the defendant and the interests of justice.) This is substantially the position of the ABA Standards Relating to Pleas of Guilty § 3.1(a), Commentary at 65–66 (Approved Draft, 1968). Apparently, it is the practice of most prosecuting attorneys to enter plea discussions only with defendant's counsel. Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 904 (1964). Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See *Anderson* v. *North Carolina*, 221 F.Supp. 930, 935 (W.D.N.C.1963); *Shape* v. *Sigler*, 230 F.Supp. 601, 606 (D.Neb. 1964).

Subdivision (e)(1) is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. Fourth, the attorneys for the government and the defense may agree that a given sentence is an appropriate disposition of the case. This is made explicit in subdivision (e)(2) where reference is made to an agreement made "in the expectation that a specific sentence will be imposed." See Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 898 (1964).

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32–52, 78–104 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891, 905 (1964).

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72–74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891–892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180–183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."), 51 A.B.A.J. 444 (1965). As has been recently pointed out:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. *United States ex rel. Elksnis* v. *Gilligan*, 256 F.Supp. 244, 254 (S.D. N.Y. 1966).

On the other hand, one commentator has taken the position that the judge may be involved in discussions

either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117–118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(1). As to what may constitute "participation," contrast *People* v. *Earegood*, 12 Mich.App. 256, 268–269, 162 N.W.2d 802, 809–810 (1968), with *Kruse* v. *State*, 47 Wis.2d 460, 177 N.W.2d 322 (1970).

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In *People* v. *West*, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970), the court said:

[T]he basis of the bargain should be disclosed to the court and incorporated in the record. * * *

Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains. 91 Cal.Rptr. 393, 394, 477 P.2d at 417, 418.

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted. For a discussion of the use of conditional plea acceptance, see ABA Standards Relating to Pleas of Guilty § 3.3(b), Commentary at 74–76, and Supplement, Proposed Revisions § 3.3(b) at 2–3 (Approved Draft, 1968); Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(2).

The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.

Subdivision (e)(3) makes it mandatory, if the court decides to accept the plea agreement, that it inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This serves the purpose of informing the defendant immediately that the agreement will be implemented.

Subdivision (e)(4) requires the court, if it rejects the plea agreement, to inform the defendant of this fact and to advise the defendant personally, in open court, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw his plea and must be advised that if he persists in his guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to him than that contemplated by the plea agreement. That the defendant should have the opportunity to withdraw his plea if the court rejects the plea agreement is the position taken in ABA Standards Relating to Pleas of Guilty, Supplement, Proposed Revisions § 2.1(a)(ii)(5) (Approved Draft, 1968). Such a rule has been adopted in Illinois. Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(2).

If the court rejects the plea agreement and affords the defendant the opportunity to withdraw the plea, the court is not precluded from accepting a guilty plea from the same defendant at a later time, when such plea conforms to the requirements of rule 11.

Subdivision (e)(5) makes it mandatory that, except for good cause shown, the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the government. ABA Standards Relating to Pleas of Guilty § 1.3 (Approved Draft, 1968). The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

Subdivision (e)(6) is taken from rule 410, Rules of Evidence for United States Courts and Magistrates (Nov. 1971). See Advisory Committee Note thereto. See also the ABA Standards Relating to Pleas of Guilty § 2.2 (Approved Draft, 1968); Illinois Supreme Court Rule 402(f) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(f).

Subdivision (f) retains the requirement of old rule 11 that the court should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy it that there is a factual basis for the plea. The draft does not specify that any particular type of inquiry be made. See *Santobello* v. *New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); "Fed.Rule Crim.Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." An inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case. This is the position of the ABA Standards Relating to Pleas of Guilty § 1.6 (Approved Draft, 1968). Where inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath. With regard to a determination that there is a factual basis for a plea of guilty to a "lessor or related offense," compare ABA Standards Relating to Pleas of Guilty § 3.1(b)(ii), Commentary at 67–68 (Approved Draft, 1968), with ALI, Model Penal Code § 1.07(5) (P.O.D. 1962). The rule does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence. *North Carolina* v. *Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

The procedure in such case would seem to be to deal with this as a plea of nolo contendere, the acceptance of which would depend upon the judge's decision as to whether acceptance of the plea is consistent with "the interest of the public in the effective administration of justice" [new rule 11(b)]. The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions. The rule is intended to make clear that a judge may reject a plea of nolo contendere and require the defendant either to plead not guilty or to plead guilty under circumstances in which the judge is able to determine that the defendant is in fact guilty of the crime to which he is pleading guilty.

Subdivision (g) requires that a verbatim record be kept of the proceedings. If there is a plea of guilty or nolo contendere, the record must include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea. Such a record is important in the event of a post-conviction attack. ABA Standards Relating to Pleas of Guilty § 1.7 (Approved Draft, 1968). A similar requirement was adopted in Illinois: Illinois Supreme Court Rule 402(e) (1970), Ill.Rev. Stat. 1973, ch. 110A, § 402(e).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 11 of the Federal Rules of Criminal Procedure deals with pleas. The Supreme Court has proposed to amend this rule extensively.

Rule 11 provides that a defendant may plead guilty, not guilty, or nolo contendere. The Supreme Court's amendments to Rule 11(b) provide that a nolo contendere plea "shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

The Supreme Court amendments to Rule 11(c) spell out the advice that the court must give to the defendant before accepting the defendant's plea of guilty or nolo contendere. The Supreme Court amendments to Rule 11(d) set forth the steps that the court must take to insure that a guilty or nolo contendere plea has been voluntarily made.

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it.

The Supreme Court amendments to Rule 11(f) require that the court, before entering judgment upon a plea of guilty, satisfy itself that "there is a factual basis for the plea." The Supreme Court amendments to Rule 11(g) require that a verbatim record be kept of the proceedings at which the defendant enters a plea.

B. Committee Action. The proposed amendments to Rule 11, particularly those relating to the plea negotiating procedure, have generated much comment and criticism. No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with. The Committee accepts the basic structure and provisions of Rule 11(e).

Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements. [Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it. See, e.g., the remarks of United States Circuit Judge William H. Webster in Hearings II, at 196. See also the exchange of correspondence between Judge Webster and United States District Judge Frank A. Kaufman in Hearings II, at 289-90.]

Proposed Rule 11(e) contemplates 4 different types of plea agreements. First, the defendant can plead guilty or nolo contendere in return for the prosecutor's reducing the charge to a less serious offense. Second, the defendant can plead guilty or nolo contendere in return for the prosecutor dropping, or not bringing, a charge or charges relating to other offenses. Third, the defendant can plead guilty or nolo contendere in return for the prosecutor's recommending a sentence. Fourth, the defendant and prosecutor can agree that a particular sentence is the appropriate disposition of the case. [It is apparent, though not explicitly stated, that Rule 11(e) contemplates that the plea agreement may bind the defendant to do more than just plead guilty or nolo contendere. For example, the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement.]

The Committee added language in subdivisions (e)(2) and (e)(4) to permit a plea agreement to be disclosed to the court, or rejected by it, in camera. There must be a showing of good cause before the court can conduct such proceedings in camera. The language does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is left for the courts to resolve on a case-by-case basis. These changes in subdivisions (e)(2) and (e)(4) will permit a fair trial when there is substantial media interest in a case and the court is rejecting a plea agreement.

The Committee added an exception to subdivision (e)(6). That subdivision provides:

> Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness. [The Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement.]

The Committee recast the language of Rule 11(c), which deals with the advice given to a defendant before the court can accept his plea of guilty or nolo contendere. The Committee acted in part because it believed that the warnings given to the defendant ought to include those that *Boykin* v. *Alabama*, 395 U.S. 238 (1969), said were constitutionally required. In addition, and as a result of its change in subdivision (e)(6), the Committee thought it only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94-414

Note to Subdivision (c). Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or nolo contendere. The House version expands upon the list originally proposed by the Supreme Court. The Senate version adopts the Supreme Court's proposal.

The Conference adopts the House provision.

Note to Subdivision (e)(1). Rule 11(e)(1) outlines some general considerations concerning the plea agreement procedure. The Senate version makes nonsubstantive change in the House version.

The Conference adopts the Senate provision.

Note to Subdivision (e)(6). Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or nolo contendere, offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath, on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere, or in connection with an offer of a guilty or nolo contendere plea.

1979 AMENDMENT

Note to Subdivision (e)(2). The amendment to rule 11(e)(2) is intended to clarify the circumstances in which the court may accept or reject a plea agreement, with the consequences specified in subdivision (e)(3) and (4). The present language has been the cause of some confusion and has led to results which are not entirely consistent. Compare *United States* v. *Sarubbi*, 416 F.Supp. 633 (D.N.J. 1976); with *United States* v. *Hull*, 413 F.Supp. 145 (E.D.Tenn. 1976).

Rule 11(e)(1) specifies three types of plea agreements, namely, those in which the attorney for the government might

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

A (B) type of plea agreement is clearly of a different order than the other two, for an agreement to recommend or not to oppose is discharged when the prosecutor performs as he agreed to do. By comparison, critical to a type (A) or (C) agreement is that the defendant receive the contemplated charge dismissal or agreed-to sentence. Consequently, there must ultimately be an acceptance or rejection by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea. But this is not so as to a type (B) agreement; there is no "disposition provided for" in such a plea agreement so as to make the acceptance provisions of subdivision (e)(3) applicable, nor is there a need for rejection with opportunity for withdrawal under subdivision (e)(4) in light of the fact that the defendant knew the nonbinding character of the recommendation or request. *United States* v. *Henderson*, 565 F.2d 1119 (9th Cir. 1977); *United States* v. *Savage*, 561 F.2d 554 (4th Cir. 1977).

Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered. The procedure contemplated by the last sentence of amended subdivision (e)(2) will establish for the record that there is such awareness. This provision conforms to ABA Standards Relating to Pleas of Guilty § 1.5 (Approved Draft, 1968), which provides that "the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."

Sometimes a plea agreement will be partially but not entirely of the (B) type, as where a defendant, charged with counts 1, 2 and 3, enters into an agreement with the attorney for the government wherein it is agreed that if defendant pleads guilty to count 1, the prosecutor will recommend a certain sentence as to that count and will move for dismissal of counts 2 and 3. In such a case, the court must take particular care to ensure that the defend-

ant understands which components of the agreement involve only a (B) type recommendation and which do not. In the above illustration, that part of the agreement which contemplates the dismissal of counts 2 and 3 is an (A) type agreement, and thus under rule 11(e) the court must either accept the agreement to dismiss these counts or else reject it and allow the defendant to withdraw his plea. If rejected, the defendant must be allowed to withdraw the plea on count 1 even if the type (B) promise to recommend a certain sentence on that count is kept, for a multi-faceted plea agreement is nonetheless a single agreement. On the other hand, if counts 2 and 3 are dismissed and the sentence recommendation is made, then the defendant is not entitled to withdraw his plea even if the sentence recommendation is not accepted by the court, for the defendant received all he was entitled to under the various components of the plea agreement.

Note to Subdivision (e)(6). The major objective of the amendment to rule 11(e)(6) is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See *United States* v. *Herman*, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed.R.Ev. 410, as originally adopted by Pub.L. 93–595, provided in part that "evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." (This rule was adopted with the proviso that it "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.") As the Advisory Committee Note explained: "Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise." The amendment of Fed.R.Crim.P. 11, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching" a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R.Rep. No. 94–247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not "discourage defendants from being completely candid and open during plea negotiations." Similarly, H.R.Rep. No. 94–414, 94th Cong., 1st Sess. 10 (1975), states that "Rule 11(e)(6) deals with the use of statements made in connection with plea agreements." (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements in a prosecution for perjury, and with the qualification that the inadmissible statements must also be "relevant to" the inadmissible pleas or offers. Pub.L. 94–64; Fed.R.Ev. 410 was then amended to conform. Pub.L. 94–149.)

While this history shows that the purpose of Fed.R.Ev. 410 and Fed.R.Crim.P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se," given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because "statements" are generally inadmissible if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See *United States* v. *Herman*, 544 F.2d 791 (5th Cir. 1977) (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty to armed robbery if the murder charge was dropped; one inspector stated they were not "in position" to make any deals in this regard; held, defendant's statement inadmissible under rule 11(e)(6) because the defendant "made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea"); *United States* v. *Brooks*, 536 F.2d 1137 (6th Cir. 1976) (defendant telephoned postal inspector and offered to plead guilty if he got 2-year maximum; statement inadmissible).

The amendment makes inadmissible statements made "in the course of any proceedings under this rule regarding" either a plea of guilty later withdrawn or a plea of nolo contendere, and also statements "made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions. See, e.g., ALI Model Code of Pre-Arraignment Procedure, art. 140 and § 150.-2(8) (Proposed Official Draft, 1975) (latter section requires exclusion if "a law enforcement officer induces any person to make a statement by promising leniency"). This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases are not covered by the per se rule of 11(e)(6) and thus must be resolved by that body of law dealing with police interrogations.

If there has been a plea of guilty later withdrawn or a plea of nolo contendere, subdivision (e)(6)(C) makes inadmissible statements made "in the course of any proceedings under this rule" regarding such pleas. This includes, for example, admissions by the defendant when he makes his plea in court pursuant to rule 11 and also admissions made to provide the factual basis pursuant to subdivision (f). However, subdivision (e)(6)(C) is not limit-

ed to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, as authorized by subdivision (e)(2), statements made to the probation officer in connection with the preparation of that report would come within this provision.

This amendment is fully consistent with all recent and major law reform efforts on this subject. ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), and ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968) both provide:

> Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The Commentary to the latter states:

> The above standard is limited to discussions and agreements with the prosecuting attorney. Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant. *State* v. *Christian*, 245 S.W.2d 895 (Mo.1952). If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.

Similarly, Unif.R.Crim.P. 441(d) (Approved Draft, 1974), provides that except under limited circumstances "no discussion between the parties or statement by the defendant or his lawyer under this Rule," i.e., the rule providing "the parties may meet to discuss the possibility of pretrial diversion * * * or of a plea agreement," are admissible. The amendment is likewise consistent with the typical state provision on this subject; see, e.g., Ill.S.Ct. Rule 402(f).

The language of the amendment identifies with more precision than the present language the necessary relationship between the statements and the plea or discussion. See the dispute between the majority and concurring opinions in *United States* v. *Herman*, 544 F.2d 791 (5th Cir. 1977), concerning the meanings and effect of the phrases "connection to" and "relevant to" in the present rule. Moreover, by relating the statements to "plea discussions" rather than "an offer to plead," the amendment ensures "that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility." *United States* v. *Brooks*, 536 F.2d 1137 (6th Cir. 1976).

The last sentence of Rule 11(e)(6) is amended to provide a second exception to the general rule of nonadmissibility of the described statements. Under the amendment, such a statement is also admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language of the amendment follows closely that in Fed.R.Evid. 106, as the considerations involved are very similar.

The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which it is offered. The change makes it clear that the latter construction is correct. No change is intended with respect to provisions making evidence rules inapplicable in certain situations. See, e.g., Fed.R.Evid. 104(a) and 1101(d).

Unlike ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968), and ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), rule 11(e)(6) does not also provide that the described evidence is inadmissible "in favor of" the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as *United States* v. *Verdoorn*, 528 F.2d 103 (8th Cir. 1976), holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."

1982 AMENDMENT

Note to Subdivision (c)(1). Subdivision (c)(1) has been amended by specifying "the effect of any special parole term" as one of the matters about which a defendant who has tendered a plea of guilty or nolo contendere is to be advised by the court. This amendment does not make any change in the law, as the courts are in agreement that such advice is presently required by Rule 11. See, e.g., *Moore v. United States*, 592 F.2d 753 (4th Cir. 1979); *United States v. Eaton*, 579 F.2d 1181 (10th Cir. 1978); *Richardson v. United States*, 577 F.2d 447 (8th Cir. 1978); *United States v. Del Prete*, 567 F.2d 928 (9th Cir. 1978); *United States v. Watson*, 548 F.2d 1058 (D.C.Cir. 1977); *United States v. Crusco*, 536 F.2d 21 (2d Cir. 1976); *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *United States v. Wolak*, 510 F.2d 164 (6th Cir. 1975). In *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), the Supreme Court assumed that the judge's failure in that case to describe the mandatory special parole term constituted "a failure to comply with the formal requirements of the Rule."

The purpose of the amendment is to draw more specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure. As noted in *Moore v. United States*, *supra*:

> Special parole is a significant penalty. * * * Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Explanation of special parole in open court is therefore essential to comply with the Rule's mandate that the defendant be informed of "the maximum possible penalty provided by law."

As the aforecited cases indicate, in the absence of specification of the requirement in the rule it has sometimes happened that such advice has been inadvertently omitted from Rule 11 warnings.

The amendment does not attempt to enumerate all of the characteristics of the special parole term which the judge ought to bring to the defendant's attention. Some flexibility in this respect must be preserved although it is well to note that the unique characteristics of this kind of parole are such that they may not be readily perceived by laymen. *Moore v. United States, supra,* recommends that in an appropriate case the judge

> inform the defendant and determine that he understands the following:
>
> (1) that a special parole term will be added to any prison sentence he receives;
>
> (2) the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;
>
> (3) that special parole is entirely different from—and in addition to—ordinary parole; and
>
> (4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

The amendment should not be read as meaning that a failure to comply with this particular requirement will inevitably entitle the defendant to relief. See *United States v. Timmreck, supra.* Likewise, the amendment makes no change in the existing law to the effect

> that many aspects of traditional parole need not be communicated to the defendant by the trial judge under the umbrella of Rule 11. For example, a defendant need not be advised of all conceivable consequences such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned. *Bunker v. Wise,* 550 F.2d 1155, 1158 (9th Cir. 1977).

Note to Subdivision (c)(4). The amendment to subdivision (c)(4) is intended to overcome the present conflict between the introductory language of subdivision (c), which contemplates the advice being given "[b]efore accepting a plea of guilty or nolo contendere," and thus presumably after the plea has been tendered, and the "if he pleads" language of subdivision (c)(4) which suggests the plea has not been tendered.

As noted by Judge Doyle in *United States v. Sinagub,* 468 F.Supp. 353 (W.D.Wis.1979):

> Taken literally, this wording of subsection (4) of 11(c) suggests that before eliciting any plea at an arraignment, the court is required to insure that a defendant understands that if he or she pleads guilty or nolo contendere, the defendant will be waiving the right to trial. Under subsection (3) of 11(c), however, there is no requirement that at this pre-plea stage, the court must insure that the defendant understands that he or she enjoys the right to a trial and, at trial, the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself. It would be incongruous to require that at the pre-plea stage the court insure that the defendant understands that if he enters a plea of guilty or nolo contendere he will be waiving a right, the existence and nature of which need not be explained until after such a plea has been entered. I conclude that the insertion of the words "that if he pleads guilty or nolo contendere," as they appear in subsection (4) of 11(c), was an accident of draftsmanship which occurred in the course of Congressional rewriting of 11(c) as it has been approved by the Supreme Court. Those words are to be construed consistently with the words "Before accepting a plea of guilty or nolo contendere," as they appear in the opening language of 11(c), and consistently with the omission of the words "that if he pleads" from subsections (1), (2), and (3) of 11(c). That is, as they appear in subsection (4) of 11(c), the words, "that if he pleads guilty or nolo contendere" should be construed to mean "that if his plea of guilty or nolo contendere is accepted by the court."

Although this is a very logical interpretation of the present language, the amendment will avoid the necessity to engage in such analysis in order to determine the true meaning of subdivision (c)(4).

Note to Subdivision (c)(5). Subdivision (c)(5), in its present form, may easily be read as contemplating that in *every* case in which a plea of guilty or nolo contendere is tendered, warnings must be given about the possible use of defendant's statements, obtained under oath, on the record and in the presence of counsel, in a later prosecution for perjury or false statement. The language has prompted some courts to reach the remarkable result that a defendant who pleads guilty or nolo contendere without receiving those warnings *must* be allowed to overturn his plea on appeal even though he was never questioned under oath, on the record, in the presence of counsel about the offense to which he pleaded. *United States v. Artis,* No. 78-5012 (4th Cir. March 12, 1979); *United States v. Boone,* 543 F.2d 1090 (4th Cir.1976). Compare *United States v. Michaelson,* 552 F.2d 472 (2d Cir.1977) (failure to give subdivision (c)(5) warnings not a basis for reversal, "at least when, as here, defendant was not put under oath before questioning about his guilty plea"). The present language of subdivision (c)(5) may also have contributed to the conclusion, not otherwise supported by the rule, that "Rule 11 requires that the defendant be under oath for the entirety of the proceedings" conducted pursuant to that rule and that failure to place the defendant under oath would itself make necessary overturning the plea on appeal. *United States v. Aldridge,* 553 F.2d 922 (5th Cir.1977).

When questioning of the kind described in subdivision (c)(5) is not contemplated by the judge who is receiving the plea, no purpose is served by giving the (c)(5) warnings, which in such circumstances can only confuse the defendant and detract from the force of the other warn-

ings required by Rule 11. As correctly noted in *United States v. Sinagub, supra,*

> subsection (5) of section (c) of Rule 11 is qualitatively distinct from the other sections of the Rule. It does not go to whether the plea is knowingly or voluntarily made, nor to whether the plea should be accepted and judgment entered. Rather, it does go to the possible consequences of an event which may or may not occur during the course of the arraignment hearing itself, namely, the administration of an oath to the defendant. Whether this event is to occur is wholly within the control of the presiding judge. If the event is not to occur, it is pointless to inform the defendant of its consequences. If a presiding judge intends that an oath not be administered to a defendant during an arraignment hearing, but alters that intention at some point, only then would the need arise to inform the defendant of the possible consequences of the administration of the oath.

The amendment to subdivision (c)(5) is intended to make it clear that this is the case.

The amendment limits the circumstances in which the warnings must be given, but does not change the fact, as noted in *Sinagub* that these warnings are "qualitatively distinct" from the other advice required by Rule 11(c). This being the case, a failure to give the subdivision (c)(5) warnings even when the defendant *was* questioned under oath, on the record and in the presence of counsel would in no way affect the validity of the defendant's plea. Rather, this failure bears upon the admissibility of defendant's answers pursuant to subdivision (e)(6) in a later prosecution for perjury or false statement.

1983 AMENDMENT

Rule 11(a)

There are many defenses, objections and requests which a defendant must ordinarily raise by pretrial motion. See, e.g., 18 U.S.C. § 3162(a)(2); Fed.R.Crim.P. 12(b). Should that motion be denied, interlocutory appeal of the ruling by the defendant is seldom permitted. See *United States* v. *MacDonald*, 435 U.S. 850 (1978) (defendant may not appeal denial of his motion to dismiss based upon Sixth Amendment speedy trial grounds); *DiBella* v. *United States*, 369 U.S. 121 (1962) (defendant may not appeal denial of pretrial motion to suppress evidence); compare *Abney* v. *United States*, 431 U.S. 651 (1977) (interlocutory appeal of denial of motion to dismiss on double jeopardy grounds permissible). Moreover, should the defendant thereafter plead guilty or nolo contendere, this will usually foreclose later appeal with respect to denial of the pretrial motion. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett* v. *Henderson*, 411 U.S. 258 (1973). Though a nolo plea differs from a guilty plea in other respects, it is clear that it also constitutes a waiver of all nonjurisdictional defects in a manner equivalent to a guilty plea. *Lott* v. *United States*, 367 U.S. 421 (1961).

As a consequence, a defendant who has lost one or more pretrial motions will often go through an entire trial simply to preserve the pretrial issues for later appellate review. This results in a waste of prosecutorial and judicial resources, and causes delay in the trial of other cases, contrary to the objectives underlying the Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq. These unfortunate consequences may be avoided by the conditional plea device expressly authorized by new subdivision (a)(2).

The development of procedures to avoid the necessity for trials which are undertaken for the sole purpose of preserving pretrial objections has been consistently favored by the commentators. See ABA Standards Relating to the Administration of Criminal Justice, standard 21–1.3(c) (2d ed. 1978); Model Code of Pre-Arraignment Procedure § SS 290.1(4)(b) (1975); Uniform Rules of Criminal Procedure, rule 444(d) (Approved Draft, 1974); 1 C. Wright, Federal Practice and Procedure—Criminal § 175 (1969); 3 W. LaFave, Search and Seizure § 11.1 (1978). The Supreme Court has characterized the New York practice, whereby appeals from suppression motions may be appealed notwithstanding a guilty plea, as a "commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." *Lefkowitz* v. *Newsome*, 420 U.S. 283, 293 (1975). That Court has never discussed conditional pleas as such, but has permitted without comment a federal appeal on issues preserved by a conditional plea. *Jaben* v. *United States*, 381 U.S. 214 (1965).

In the absence of specific authorization by statute or rule for a conditional plea, the circuits have divided on the permissibility of the practice. Two circuits have actually approved the entry of conditional pleas, *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975); *United States* v. *Moskow*, 588 F.2d 882 (3d Cir. 1978); and two others have praised the conditional plea concept, *United States* v. *Clark*, 459 F.2d 977 (8th Cir. 1972); *United States* v. *Dorsey*, 449 F.2d 1104 (D.C.Cir. 1971). Three circuits have expressed the view that a conditional plea is logically inconsistent and thus improper, *United States* v. *Brown*, 499 F.2d 829 (7th Cir. 1974); *United States* v. *Sepe*, 472 F.2d 784, aff'd en banc, 486 F.2d 1044 (5th Cir. 1973); *United States* v. *Cox*, 464 F.2d 937 (6th Cir. 1972); three others have determined only that conditional pleas are not now authorized in the federal system, *United States* v. *Benson*, 579 F.2d 508 (9th Cir. 1978); *United States* v. *Nooner*, 565 F.2d 633 (10th Cir. 1977); *United States* v. *Matthews*, 472 F.2d 1173 (4th Cir. 1973); while one circuit has reserved judgment on the issue, *United States* v. *Warwar*, 478 F.2d 1183 (1st Cir. 1973). (At the state level, a few jurisdictions by statute allow appeal from denial of a motion to suppress notwithstanding a subsequent guilty plea, Cal. Penal Code § 1538.5(m); N.Y.Crim. Proc. Law § 710.20(1); Wis.Stat.Ann. § 971.31(10), but in the absence of such a provision the state courts are also in disagreement as to whether a conditional plea is permissible; see cases collected in Comment, 26 U.C.L.A.L.Rev. 360, 373 (1978).)

The conditional plea procedure provided for in subdivision (a)(2) will, as previously noted, serve to conserve prosecutorial and judicial resources and advance speedy trial objectives. It will also produce much needed uniformity in the federal system on this matter; see *United States* v. *Clark*, supra, noting the split of authority and urging resolution by statute or rule. Also, the availabili-

ty of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects. See *United States* v. *Nooner*, supra (defendant sought appellate review of denial of pretrial suppression motion, despite his prior unqualified guilty plea, claiming the Second Circuit conditional plea practice led him to believe a guilty plea did not bar appeal of pretrial issues).

The obvious advantages of the conditional plea procedure authorized by subdivision (a)(2) are not outweighed by any significant or compelling disadvantages. As noted in Comment, supra, at 375: "Four major arguments have been raised by courts disapproving of conditioned pleas. The objections are that the procedure encourages a flood of appellate litigation, militates against achieving finality in the criminal process, reduces effectiveness of appellate review due to the lack of a full trial record, and forces decision on constitutional questions that could otherwise be avoided by invoking the harmless error doctrine." But, as concluded therein, those "arguments do not withstand close analysis." Ibid.

As for the first of those arguments, experience in states which have permitted appeals of suppression motions notwithstanding a subsequent plea of guilty is most relevant, as conditional pleas are likely to be most common when the objective is to appeal that kind of pretrial ruling. That experience has shown that the number of appeals has not increased substantially. See Comment, 9 Hous.L.Rev. 305, 315–19 (1971). The minimal added burden at the appellate level is certainly a small price to pay for avoiding otherwise unnecessary trials.

As for the objection that conditional pleas conflict with the government's interest in achieving finality, it is likewise without force. While it is true that the conditional plea does not have the complete finality of the traditional plea of guilty or nolo contendere because "the essence of the agreement is that the legal guilt of the defendant exists only if the prosecution's case" survives on appeal, the plea

> continues to serve a partial state interest in finality, however, by establishing admission of the defendant's factual guilt. The defendant stands guilty and the proceedings come to an end if the reserved issue is ultimately decided in the government's favor.

Comment, 26 U.C.L.A. L.Rev. 360, 378 (1978).

The claim that the lack of a full trial record precludes effective appellate review may on occasion be relevant. Cf. *United States* v. *MacDonald*, supra (holding interlocutory appeal not available for denial of defendant's pretrial motion to dismiss on speedy trial grounds, and noting that "most speedy trial claims * * * are best considered only after the relevant facts have been developed at trial"). However, most of the objections which would likely be raised by pretrial motion and preserved for appellate review by a conditional plea are subject to appellate resolution without a trial record. Certainly this is true as to the very common motion to suppress evidence, as is indicated by the fact that appellate courts presently decide such issues upon interlocutory appeal by the government.

With respect to the objection that conditional pleas circumvent application of the harmless error doctrine, it must be acknowledged that "[a]bsent a full trial record, containing all the government's evidence against the defendant, invocation of the harmless error rule is arguably impossible." Comment, supra, at 380. But, the harmless error standard with respect to constitutional objections is sufficiently high, see *Chapman* v. *California*, 386 U.S. 18 (1967), that relatively few appellate decisions result in affirmance upon that basis. Thus it will only rarely be true that the conditional plea device will cause an appellate court to consider constitutional questions which could otherwise have been avoided by invocation of the doctrine of harmless error.

To the extent that these or related objections would otherwise have some substance, they are overcome by the provision in Rule 11(a)(2) that the defendant may enter a conditional plea only "with the approval of the court and the consent of the government." (In this respect, the rule adopts the practice now found in the Second Circuit.) The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial; cf. *United States* v. *MacDonald*, supra. As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay. Although it was suggested in *United States* v. *Moskow*, supra, that the government should have no right to prevent the entry of a conditional plea because a defendant has no comparable right to block government appeal of a pretrial ruling pursuant to 18 U.S.C. § 3731, that analogy is unconvincing. That statute requires the government to certify that the appeal is not taken for purposes of delay. Moreover, where the pretrial ruling is case-dispositive, § 3731 is the only mechanism by which the government can obtain appellate review, but a defendant may always obtain review by pleading not guilty.

Unlike the state statutes cited earlier, Rule 11(a)(2) is not limited to instances in which the pretrial ruling the defendant wishes to appeal was in response to defendant's motion to suppress evidence. Though it may be true that the conditional plea device will be most commonly employed as to such rulings, the objectives of the rule are well served by extending it to other pretrial rulings as well. See, e.g., ABA Standards, supra (declaring the New York provision "should be enlarged to include other pretrial defenses"); Uniform Rules of Criminal Procedure, rule 444(d) (Approved Draft, 1974) ("any pretrial motion which, if granted, would be dispositive of the case").

The requirement that the conditional plea be made by the defendant "reserving in writing the right to appeal from the adverse determination of any specified pretrial

motion," though extending beyond the Second Circuit practice, will ensure careful attention to any conditional plea. It will document that a particular plea was in fact conditional, and will identify precisely what pretrial issues have been preserved for appellate review. By requiring this added step, it will be possible to avoid entry of a conditional plea without the considered acquiescence of the government (see *United States* v. *Burke*, supra, holding that failure of the government to object to entry of a conditional plea constituted consent) and post-plea claims by the defendant that his plea should be deemed conditional merely because it occurred after denial of his pretrial motions (see *United States* v. *Nooner*, supra).

It must be emphasized that the *only* avenue of review of the specified pretrial ruling permitted under a rule 11(a)(2) conditional plea is an appeal, which must be brought in compliance with Fed.R.App.P. 4(b). Relief via 28 U.S.C. § 2255 is not available for this purpose.

The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. *Menna* v. *New York*, 423 U.S. 61 (1975) (double jeopardy violation); *Blackledge* v. *Perry*, 417 U.S. 21 (1974) (due process violation by charge enhancement following defendant's exercise of right to trial de novo). Subdivision 11(a)(2) has no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application.

Rule 11(h)

Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11. The provision does not, however, attempt to define the meaning of "harmless error," which is left to the case law. Prior to the amendments which took effect on Dec. 1, 1975, Rule 11 was very brief; it consisted of but four sentences. The 1975 amendments increased significantly the procedures which must be undertaken when a defendant tenders a plea of guilty or nolo contendere, but this change was warranted by the "two principal objectives" then identified in the Advisory Committee Note: (1) ensuring that the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into the open in court. An inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require.

This being so, it became more apparent than ever that Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substance. As stated in *United States* v. *Scarf*, 551 F.2d 1124 (8th Cir. 1977), concerning amended Rule 11: "It is a salutary rule, and district courts are required to act in substantial compliance with it although * * * ritualistic compliance is not required." As similarly pointed out in *United States* v. *Saft*, 558 F.2d 1073 (2d Cir. 1977),

> the Rule does not say that compliance can be achieved only by reading the specified items *in haec verba*. Congress meant to strip district judges of freedom to decide *what* they must explain to a defendant who wishes to plead guilty, not to tell them precisely *how* to perform this important task in the great variety of cases that would come before them. While a judge who contents himself with literal application of the Rule will hardly be reversed, it cannot be supposed that Congress preferred this to a more meaningful explanation, provided that all the specified elements were covered.

Two important points logically flow from these sound observations. One concerns the matter of construing Rule 11: it is not to be read as requiring a litany or other ritual which can be carried out only by word-for-word adherence to a set "script." The other, specifically addressed in new subdivision (h), is that even when it may be concluded Rule 11 has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.

Notwithstanding the declaration in Rule 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," there has existed for some years considerable disagreement concerning the applicability of the harmless error doctrine to Rule 11 violations. In large part, this is attributable to uncertainty as to the continued vitality and the reach of *McCarthy* v. *United States*, 394 U.S. 459 (1969). In *McCarthy*, involving a direct appeal from a plea of guilty because of noncompliance with Rule 11, the Court concluded

> that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding [is] that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew * * *.

McCarthy has been most frequently relied upon in cases where, as in that case, the defendant sought relief because of a Rule 11 violation by the avenue of direct appeal. It has been held that in such circumstances a defendant's conviction must be reversed whenever the "district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," *United States* v. *Boone*, 543 F.2d 1090 (4th Cir. 1976), and that in this context any reliance by the government on the Rule 52(a) harmless error concept "must be rejected." *United States* v. *Journet*, 544 F.2d 633 (2d Cir. 1976). On the other hand, decisions are to be found taking a harmless error approach on direct appeal where it appeared the nature and extent of the deviation from Rule 11 was such that it could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea. *United States* v. *Peters*, No. 77–1700 (4th Cir., Dec. 22, 1978) (where judge failed to comply fully with Rule 11(c)(1), in that defendant not correctly advised of maximum years of special parole term but was told it is at least 3 years, and defendant thereafter sentenced to 15 years plus 3-year special parole term, government's motion for summary affirmance granted, as "the error was harmless"); *United States* v. *Coronado*, 554 F.2d 166 (5th Cir. 1977) (court first holds that charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then finds no reversible

error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that Coronado understood them").

But this conflict has not been limited to cases involving nothing more than a direct appeal following defendant's plea. For example, another type of case is that in which the defendant has based a post-sentence motion to withdraw his plea on a Rule 11 violation. Rule 32(d) says that such a motion may be granted "to correct manifest injustice," and some courts have relied upon this latter provision in holding that post-sentence plea withdrawal need not be permitted merely because Rule 11 was not fully complied with and that instead the district court should hold an evidentiary hearing to determine "whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand." *United States* v. *Scarf*, 551 F.2d 1124 (8th Cir. 1977). Others, however, have held that *McCarthy* applies and prevails over the language of Rule 32(d), so that "a failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice." *United States* v. *Cantor*, 469 F.2d 435 (3d Cir. 1972).

Disagreement has also existed in the context of collateral attack upon pleas pursuant to 28 U.S.C. § 2255. On the one hand, it has been concluded that "[n]ot every violation of Rule 11 requires that the plea be set aside" in a § 2255 proceeding, and that "a guilty plea will be set aside on collateral attack only where to not do so would result in a miscarriage of justice, or where there exists exceptional circumstances justifying such relief." *Evers* v. *United States*, 579 F.2d 71 (10th Cir. 1978). The contrary view was that *McCarthy* governed in § 2255 proceedings because "the Supreme Court hinted at no exceptions to its policy of strict enforcement of Rule 11." *Timmreck* v. *United States*, 577 F.2d 377 (6th Cir. 1978). But a unanimous Supreme Court resolved this conflict in *United States* v. *Timmreck*, 441 U.S. 780 (1979), where the Court concluded that the reasoning of *Hill* v. *United States*, 368 U.S. 424 (1962) (ruling a collateral attack could not be predicated on a violation of Rule 32(a)) is equally applicable to a formal violation of Rule 11. * * *

> Indeed, if anything, this case may be a stronger one for foreclosing collateral relief than the *Hill* case. For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.
>
> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

This interest in finality is strongest in the collateral attack context the Court was dealing with in *Timmreck*, which explains why the Court there adopted the *Hill* requirement that in a § 2255 proceeding the rule violation must amount to "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." The interest in finality of guilty pleas described in *Timmreck* is of somewhat lesser weight when a direct appeal is involved (so that the *Hill* standard is obviously inappropriate in that setting), but yet is sufficiently compelling to make unsound the proposition that reversal is required even where it is apparent that the Rule 11 violation was of the harmless error variety.

Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. For one thing, it is important to recall that *McCarthy* dealt only with the much simpler pre-1975 version of Rule 11, which required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight. This means that the chances of a *truly* harmless error (which was not involved in *McCarthy* in any event, as the judge made *no* inquiry into the defendant's understanding of the nature of the charge, and the government had presented only the extreme argument that a court "could properly *assume* that petitioner was entering that plea with a complete understanding of the charge against him" merely from the fact he had stated he desired to plead guilty) are much greater under present Rule 11 than under the version before the Court in *McCarthy*. It also means that the more elaborate and lengthy procedures of present Rule 11, again as compared with the version applied in *McCarthy*, make it more apparent than ever that a guilty plea is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim," but rather " 'a grave and solemn act,' which is 'accepted only with care and discernment.' " *United States* v. *Barker*, 514 F.2d 208 (D.C.Cir.1975), quoting from *Brady* v. *United States*, 397 U.S. 742 (1970). A plea of that character should not be overturned, even on direct appeal, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

Secondly, while *McCarthy* involved a situation in which the defendant's plea of guilty was before the court of appeals on direct appeal, the Supreme Court appears to have been primarily concerned with § 2255-type cases, for the Court referred exclusively to cases of that kind in the course of concluding that a per se rule was justified as to Rule 11 violations because of "the difficulty of achieving [rule 11's] purposes through a post-conviction voluntariness hearing." But that reasoning has now been substantially undercut by *United States* v. *Timmreck*, supra, for the Court there concluded § 2255 relief "is not available when all that is shown is a failure to comply with the formal requirements of the Rule," at least absent "other aggravating circumstances," which presumably could often only be developed in the course of a later evidentiary hearing.

Although all of the aforementioned considerations support the policy expressed in new subdivision (h), the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should *not* be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would *not* be harmless

error under subdivision (h) where, for example, as in *McCarthy*, there had been absolutely no inquiry by the judge into defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed a desire to plead guilty. Likewise, it would *not* be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this "results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." *United States* v. *Crook*, 526 F.2d 708 (5th Cir. 1976).

Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter "must be resolved solely on the basis of the Rule 11 transcript" and the other portions (e.g., sentencing hearing) of the limited record made in such cases. *United States* v. *Coronado*, supra. Illustrative are: where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime was not mentioned, but the defendant's responses clearly indicate his awareness of that element, see *United States* v. *Coronado*, supra; where the judge's compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings, see *United States* v. *Peters*, supra; and where the judge completely failed to comply with subdivision (c)(5), which of course has no bearing on the validity of the plea itself, cf. *United States* v. *Sinagub*, supra.

The second cautionary note is that subdivision (h) should *not* be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed out in *McCarthy*, that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice, as it

> will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

It must also be emphasized that a harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings. Thus, the addition of subdivision (h) should *not* be read as suggesting that Rule 52(a) does not apply in other circumstances because of the absence of a provision comparable to subdivision (h) attached to other rules.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) Notice by the Government of the Intention to Use Evidence.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

(i) Production of Statements at Suppression Hearing. Except as herein provided, rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(11), (12), 89 Stat. 372; Apr. 28, 1983, eff. Aug. 1, 1983.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. This rule abolishes pleas to the jurisdiction, pleas in abatement, demurrers, special pleas in bar, and motions to quash. A motion to dismiss or for other appropriate relief is substituted for the purpose of raising all defenses and objections heretofore interposed in any of the foregoing modes. "This should result in a reduction of opportunities for dilatory tactics and, at the same time, relieve the defense of embarrassment. Many competent practitioners have been baffled and mystified by the distinctions between pleas in abatement, pleas in bar, demurrers, and motions to quash, and have, at times, found difficulty in determining which of these should be invoked." Homer Cummings, 29 A.B.A. Jour. 655. See also, Medalie, 4 Lawyers Guild R. (3)1, 4.

2. A similar change was introduced by the Federal Rules of Civil Procedure (Rule 7(a)) which has proven successful. It is also proposed by the A.L.I. Code of Criminal Procedure (Sec. 209).

Note to Subdivision (b)(1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rules of Civil Procedure, 28 U.S.C., Appendix.)

In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure, 28 U.S.C., Appendix.) Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc.

In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc. Such matters have been heretofore raised by demurrers, special pleas in bar and motions to quash.

Note to Subdivision (b)(3). This rule, while requiring the motion to be made before pleading, vests discretionary authority in the court to permit the motion to be made within a reasonable time thereafter. The rule supersedes 18 U.S.C. former § 556a (now §§ 3288, 3289), fixing a definite limitation of time for pleas in abatement and motions to quash. The rule also eliminates the requirement for technical withdrawal of a plea if it is desired to interpose a preliminary objection or defense after the plea has been entered. Under this rule a plea will be permitted to stand in the meantime.

Note to Subdivision (b)(4). This rule substantially restates existing law. It leaves with the court discretion to determine in advance of trial defenses and objections raised by motion or to defer them for determination at the trial. It preserves the right to jury trial in those cases in which the right is given under the Constitution or by statute. In all other cases it vests in the court authority to determine issues of fact in such manner as the court deems appropriate.

Note to Subdivision (b)(5). 1. The first sentence substantially restates existing law, 18 U.S.C. former

§ 561 (Indictments and presentments; judgment on demurrer), which provides that in case a demurrer to an indictment or information is overruled, the judgment shall be respondeat ouster.

2. The last sentence of the rule that "Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations" is intended to preserve the provisions of statutes which permit a reindictment if the original indictment is found defective or is dismissed for other irregularities and the statute of limitations has run in the meantime, 18 U.S.C. former § 587 (now § 3288) (Defective indictment; defect found after period of limitations; reindictment); Id. former sec. 588 (now § 3289) (Defective indictment; defect found before period of limitations; reindictment); Id. 18 U.S.C. former § 589 (now §§ 3288, 3289) (Defective indictment; defense of limitations to new indictment); Id. 18 U.S.C. former § 556a (now §§ 3288, 3289) (Indictments and presentments; objections to drawing or qualification of grand jury; time for filing; suspension of statute of limitations).

1974 AMENDMENT

Subdivision (a) remains as it was in the old rule. It "speaks only of defenses and objections that prior to the rules could have been raised by a plea, demurrer, or motion to quash" (C. Wright, Federal Practice and Procedure: Criminal § 191 at p. 397 (1969)), and this might be interpreted as limiting the scope of the rule. However, some courts have assumed that old rule 12 does apply to pretrial motions generally, and the amendments to subsequent subdivisions of the rule should make clear that the rule is applicable to pretrial motion practice generally. (See e.g., rule 12(b)(3), (4), (5) and rule 41(e).)

Subdivision (b) is changed to provide for some additional motions and requests which must be made prior to trial. Subdivisions (b)(1) and (2) are restatements of the old rule.

Subdivision (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. This is the current rule with regard to evidence obtained as a result of an illegal search. See rule 41(e); C. Wright, Federal Practice and Procedure: Criminal § 673 (1969, Supp. 1971). It is also the practice with regard to other forms of illegality such as the use of unconstitutional means to obtain a confession. See C. Wright, Federal Practice and Procedure: Criminal § 673 at p. 108 (1969). It seems apparent that the same principle should apply whatever the claimed basis for the application of the exclusionary rule of evidence may be. This is consistent with the court's statement in *Jones* v. *United States*, 362 U.S. 257, 264, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960):

This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed **to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt.** (Emphasis added.)

Subdivision (b)(4) provides for a pretrial request for discovery by either the defendant or the government to the extent to which such discovery is authorized by rule 16.

Subdivision (b)(5) provides for a pretrial request for a severance as authorized in rule 14.

Subdivision (c) provides that a time for the making of motions shall be fixed at the time of the arraignment or as soon thereafter as practicable by court rule or direction of a judge. The rule leaves to the individual judge whether the motions may be oral or written. This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970); see especially §§ 5.2 and 5.3. It also is the procedure followed in those jurisdictions which have used the so-called "omnibus hearing" originated by Judge James Carter in the Southern District of California. See 4 Defender Newsletter 44 (1967); Miller, The Omnibus Hearing—An Experiment in Federal Criminal Discovery, 5 San Diego L.Rev. 293 (1968); American Bar Association, Standards Relating to Discovery and Procedure Before Trial, Appendices B, C, and D (Approved Draft, 1970). The omnibus hearing is also being used, on an experimental basis, in several other district courts. Although the Advisory Committee is of the view that it would be premature to write the omnibus hearing procedure into the rules, it is of the view that the single pretrial hearing should be made possible and its use encouraged by the rules.

There is a similar trend in state practice. See, e.g., *State ex rel. Goodchild* v. *Burke*, 27 Wis.2d 244, 133 N.W.2d 753 (1965); *State ex rel. Rasmussen* v. *Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965).

The rule provides that the motion date be set at "the arraignment or as soon thereafter as practicable." This is the practice in some federal courts including those using the omnibus hearing. (In order to obtain the advantage of the omnibus hearing, counsel routinely plead not guilty at the initial arraignment on the information or indictment and then may indicate a desire to change the plea to guilty following the omnibus hearing. This practice builds a more adequate record in guilty plea cases.) The rule further provides that the date may be set before the arraignment if local rules of court so provide.

Subdivision (d) provides a mechanism for insuring that a defendant knows of the government's intention to use evidence to which the defendant may want to object. On some occasions the resolution of the admissibility issue prior to trial may be advantageous to the government. In these situations the attorney for the government can make effective defendant's obligation to make his motion to suppress prior to trial by giving defendant notice of the government's intention to use certain evidence. For example, in United States v. Desist, 384 F.2d 889, 897 (2d Cir. 1967), the court said:

Early in the pre-trial proceedings, the Government commendably informed both the court and defense counsel that an electronic listening device had been used in investigating the case, and suggested a hearing be held as to its legality.

See also the "Omnibus Crime Control and Safe Streets Act of 1968," 18 U.S.C. § 2518(9):

The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or

other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

In cases in which defendant wishes to know what types of evidence the government intends to use so that he can make his motion to suppress prior to trial, he can request the government to give notice of its intention to use specified evidence which the defendant is entitled to discover under rule 16. Although the defendant is already entitled to discovery of such evidence prior to trial under rule 16, rule 12 makes it possible for him to avoid the necessity of moving to suppress evidence which the government does not intend to use. No sanction is provided for the government's failure to comply with the court's order because the committee believes that attorneys for the government will in fact comply and that judges have ways of insuring compliance. An automatic exclusion of such evidence, particularly where the failure to give notice was not deliberate, seems to create too heavy a burden upon the exclusionary rule of evidence, especially when defendant has opportunity for broad discovery under rule 16. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance (Approved Draft, 1971) at p. 116:

A failure to comply with the duty of giving notice could lead to the suppression of evidence. Nevertheless, the standards make it explicit that the rule is intended to be a matter of procedure which need not under appropriate circumstances automatically dictate that evidence otherwise admissible be suppressed.

Pretrial notice by the prosecution of its intention to use evidence which may be subject to a motion to suppress is increasingly being encouraged in state practice. See, e.g., *State ex rel. Goodchild* v. *Burke*, 27 Wis.2d 244, 264, 133 N.W.2d 753, 763 (1965):

In the interest of better administration of criminal justice we suggest that wherever practicable the prosecutor should within a reasonable time before trial notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. We also suggest, in cases where such notice is given by the prosecution, that the defense, if it intends to attack the confession or admission as involuntary, notify the prosecutor of a desire by the defense for a special determination on such issue.

See also *State ex rel. Rasmussen* v. *Tahash*, 272 Minn. 539, 553–556, 141 N.W.2d 3, 13–15 (1965):

At the time of arraignment when a defendant pleads not guilty, or as soon as possible thereafter, the state will advise the court as to whether its case against the defendant will include evidence obtained as the result of a search and seizure; evidence discovered because of a confession or statements in the nature of a confession obtained from the defendant; or confessions or statements in the nature of confessions.

Upon being so informed, the court will formally advise the attorney for the defendant (or the defendant himself if he refuses legal counsel) that he may, if he chooses, move the court to suppress the evidence so secured or the confession so obtained if his contention is that such evidence was secured or confession obtained in violation of defendant's constitutional rights. * * *

The procedure which we have outlined deals only with evidence obtained as the result of a search and seizure and evidence consisting of or produced by confession on the part of the defendant. However, the steps which have been suggested as a method of dealing with evidence of this type will indicate to counsel and to the trial courts that the pretrial consideration of other evidentiary problems, the resolution of which is needed to assure the integrity of the trial when conducted, will be most useful and that this court encourages the use of such procedures whenever practical.

Subdivision (e) provides that the court shall rule on a pretrial motion before trial unless the court orders that it be decided upon at the trial of the general issue or after verdict. This is the old rule. The reference to issues which must be tried by the jury is dropped as unnecessary, without any intention of changing current law or practice. The old rule begs the question of when a jury decision is required at the trial, providing only that a jury is necessary if "required by the Constitution or an act of Congress." It will be observed that subdivision (e) confers general authority to defer the determination of any pretrial motion until after verdict. However, in the case of a motion to suppress evidence the power should be exercised in the light of the possibility that if the motion is ultimately granted a retrial of the defendant may not be permissible.

Subdivision (f) provides that a failure to raise the objections or make the requests specified in subdivision (b) constitutes a waiver thereof, but the court is allowed to grant relief from the waiver if adequate cause is shown. See C. Wright, Federal Practice and Procedure: Criminal § 192 (1969), where it is pointed out that the old rule is unclear as to whether the waiver results only from a failure to raise the issue prior to trial or from the failure to do so at the time fixed by the judge for a hearing. The amendment makes clear that the defendant and, where appropriate, the government have an obligation to raise the issue at the motion date set by the judge pursuant to subdivision (c).

Subdivision (g) requires that a verbatim record be made of pretrial motion proceedings and requires the judge to make a record of his findings of fact and conclusions of law. This is desirable if pretrial rulings are to be subject to post-conviction review on the record. The judge may find and rule orally from the bench, so long as a verbatim record is taken. There is no necessity of a separate written memorandum containing the judge's findings and conclusions.

Subdivision (h) is essentially old rule 12(b)(5) except for the deletion of the provision that defendant may plead if the motion is determined adversely to him or, if he has already entered a plea, that that plea stands. This language seems unnecessary particularly in light of the experience in some district courts where a pro forma plea of not guilty is entered at the arraignment, pretrial motions are later made, and depending upon the outcome the defendant may then change his plea to guilty or persist in his plea of not guilty.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 12 of the Federal Rules of Criminal Procedure deals with pretrial motions and pleadings. The Supreme Court proposed several amendments to it. The more significant of these are set out below.

Subdivision (b) as proposed to be amended provides that the pretrial motions may be oral or written, at the court's discretion. It also provides that certain types of motions must be made before trial.

Subdivision (d) as proposed to be amended provides that the government, either on its own or in response to a request by the defendant, must notify the defendant of its intention to use certain evidence in order to give the defendant an opportunity before trial to move to suppress that evidence.

Subdivision (e) as proposed to be amended permits the court to defer ruling on a pretrial motion until the trial of the general issue or until after verdict.

Subdivision (f) as proposed to be amended provides that the failure before trial to file motions or requests or to raise defenses which must be filed or raised prior to trial, results in a waiver. However, it also provides that the court, for cause shown, may grant relief from the waiver.

Subdivision (g) as proposed to be amended requires that a verbatim record be made of the pretrial motion proceedings and that the judge make a record of his findings of fact and conclusions of law.

B. Committee Action. The Committee modified subdivision (e) to permit the court to defer its ruling on a pretrial motion until after the trial only for good cause. Moreover, the court cannot defer its ruling if to do so will adversely affect a party's right to appeal. The Committee believes that the rule proposed by the Supreme Court could deprive the government of its appeal rights under statutes like section 3731 of title 18 of the United States Code. Further, the Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.

The Committee also modified subdivision (h), which deals with what happens when the court grants a pretrial motion based upon a defect in the institution of the prosecution or in the indictment or information. The Committee's change provides that when such a motion is granted, the court may order that the defendant be continued in custody or that his bail be continued for a specified time. A defendant should not automatically be continued in custody when such a motion is granted. In order to continue the defendant in custody, the court must not only determine that there is probable cause, but it must also determine, in effect, that there is good cause to have the defendant arrested.

1983 AMENDMENT

Rule 12(i)

As noted in the recent decision of *United States* v. *Raddatz*, 447 U.S. 667 (1980), hearings on pretrial suppression motions not infrequently necessitate a determination of the credibility of witnesses. In such a situation, it is particularly important, as also highlighted by *Raddatz*, that the record include some other evidence which tends to either verify or controvert the assertions of the witness. (This is especially true in light of the *Raddatz* holding that a district judge, in order to make an independent evaluation of credibility, is not required to rehear testimony on which a magistrate based his findings and recommendations following a suppression hearing before the magistrate.) One kind of evidence which can often fulfill this function is prior statements of the testifying witness, yet courts have consistently held that in light of the Jencks Act, 18 U.S.C. § 3500, such production of statements cannot be compelled at a pretrial suppression hearing. *United States* v. *Spagnuolo*, 515 F.2d 818 (9th Cir. 1975); *United States* v. *Sebastian*, 497 F.2d 1267 (2nd Cir. 1974); *United States* v. *Montos*, 421 F.2d 215 (5th Cir. 1970). This result, which finds no express Congressional approval in the legislative history of the Jencks Act, see *United States* v. *Sebastian*, supra; *United States* v. *Covello*, 410 F.2d 536 (2d Cir. 1969), would be obviated by new subdivision (i) of rule 12.

This change will enhance the accuracy of the factual determinations made in the context of pretrial suppression hearings. As noted in *United States* v. *Sebastian*, supra, it can be argued

> most persuasively that the case for pre-trial disclosure is strongest in the framework of a suppression hearing. Since findings at such a hearing as to admissibility of challenged evidence will often determine the result at trial and, at least in the case of fourth amendment suppression motions, cannot be relitigated later before the trier of fact, pre-trial production of the statements of witnesses would aid defense counsel's impeachment efforts at perhaps the most crucial point in the case. * * [A] government witness at the suppression hearing may not appear at trial so that defendants could never test his credibility with the benefits of Jencks Act material.

The latter statement is certainly correct, for not infrequently a police officer who must testify on a motion to suppress as to the circumstances of an arrest or search will not be called at trial because he has no information necessary to the determination of defendant's guilt. See, e.g., *United States* v. *Spagnuolo*, supra (dissent notes that "under the prosecution's own admission, it did not intend to produce at trial the witnesses called at the pre-trial suppression hearing"). Moreover, even if that person did testify at the trial, if that testimony went to a different subject matter, then under rule 26.2(c) only portions of prior statements covering the same subject matter need be produced, and thus portions which might contradict the suppression hearing testimony would not be revealed. Thus, while it may be true, as declared in *United States* v. *Montos*, supra, that "due process does not require premature production at pre-trial hearings on motions to suppress of statements ultimately subject to discovery under the Jencks Act," the fact of the matter is that those statements—or, the essential portions thereof—are not necessarily subject to later discovery.

Moreover, it is not correct to assume that somehow the problem can be solved by leaving the suppression issue "open" in some fashion for resolution once the trial is under way, at which time the prior statements will be produced. In *United States* v. *Spagnuolo*, supra, the

court responded to the defendant's dilemma of inaccessible prior statements by saying that the suppression motion could simply be deferred until trial. But, under the current version of rule 12 this is not possible; subdivision (b) declares that motions to suppress "must" be made before trial, and subdivision (e) says such motions cannot be deferred for determination at trial "if a party's right to appeal is adversely affected," which surely is the case as to suppression motions. As for the possibility of the trial judge reconsidering the motion to suppress on the basis of prior statements produced at trial and casting doubt on the credibility of a suppression hearing witness, it is not a desirable or adequate solution. For one thing, as already noted, there is no assurance that the prior statements will be forthcoming. Even if they are, it is not efficient to delay the continuation of the trial to undertake a reconsideration of matters which could have been resolved in advance of trial had the critical facts then been available. Furthermore, if such reconsideration is regularly to be expected of the trial judge, then this would give rise on appeal to unnecessary issues of the kind which confronted the court in *United States* v. *Montos*, supra—whether the trial judge was obligated either to conduct a new hearing or to make a new determination in light of the new evidence.

The second sentence of subdivision (i) provides that a law enforcement officer is to be deemed a witness called by the government. This means that when such a federal, state or local officer has testified at a suppression hearing, the defendant will be entitled to any statement of the officer in the possession of the government and relating to the subject matter concerning which the witness has testified, without regard to whether the officer was in fact called by the government or the defendant. There is considerable variation in local practice as to whether the arresting or searching officer is considered the witness of the defendant or of the government, but the need for the prior statement exists in either instance.

The second sentence of subdivision (i) also provides that upon a claim of privilege the court is to excise the privileged matter before turning over the statement. The situation most likely to arise is that in which the prior statement of the testifying officer identifies an informant who supplied some or all of the probable cause information to the police. Under *McCray* v. *Illinois*, 386 U.S. 300 (1967), it is for the judge who hears the motion to decide whether disclosure of the informant's identity is necessary in the particular case. Of course, the government in any case may prevent disclosure of the informant's identity by terminating reliance upon information from that informant.

Rule 12.1. Notice of Alibi

(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(d) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

(Added Apr. 22, 1974, eff. Dec. 1, 1975; amended July 31, 1975, Pub.L. 94-64, § 3(13), 89 Stat. 372.)

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 12.1 is new. See rule 87 of the United States District Court Rules for the District of Columbia for a somewhat comparable provision.

The Advisory Committee has dealt with the issue of notice of alibi on several occasions over the course of the past three decades. In the Preliminary Draft of the Federal Rules of Criminal Procedure, 1943, and the Second Preliminary Draft, 1944, an alibi-notice rule was proposed. But the Advisory Committee was closely divided upon whether there should be a rule at all and, if there were to be a rule, what the form of the rule should be. Orfield, The Preliminary Draft of the Federal Rules of Criminal Procedure, 22 Texas L.Rev. 37, 57-58 (1943). The principal disagreement was whether the prosecutor or the defendant should initiate the process. The Second

Preliminary Draft published in 1944 required the defendant to initiate the process by a motion to require the government to state with greater particularity the time and place it would rely on. Upon receipt of this information, defendant was required to give his notice of alibi. This formulation was "vehemently objected" to by five members of the committee (out of a total of eighteen) and two alternative rule proposals were submitted to the Supreme Court. Both formulations—one requiring the prosecutor to initiate the process, the other requiring the defendant to initiate the process—were rejected by the Court. See Epstein, Advance Notice of Alibi, 55 J.Crim.L., C. & P.S. 29, 30 (1964), in which the view is expressed that the unresolved split over the rule "probably caused" the court to reject an alibi-notice rule.

Rule 12.1 embodies an intermediate position. The initial burden is upon the defendant to raise the defense of alibi, but he need not specify the details of his alibi defense until the government specifies the time, place, and date of alleged offense. Each party must, at the appropriate time, disclose the names and addresses of witnesses.

In 1962 the Advisory Committee drafted an alibi-notice rule and included it in the Preliminary Draft of December 1962, rule 12A at pp. 5–6. This time the Advisory Committee withdrew the rule without submitting it to the Standing Committee on Rules of Practice and Procedure. Wright, Proposed Changes in Federal Civil, Criminal, and Appellate Procedure, 35 F.R.D. 317, 326 (1964). Criticism of the December 1962 alibi-notice rule centered on constitutional questions and questions of general fairness to the defendant. See Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L.J. 477, 497–499.

Doubts about the constitutionality of a notice-of-alibi rule were to some extent resolved by *Williams* v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). In that case the court sustained the constitutionality of the Florida notice-of-alibi statute, but left unresolved two important questions.

(1) The court said that it was not holding that a notice-of-alibi requirement was valid under conditions where a defendant does not enjoy "reciprocal discovery against the State." 399 U.S. at 82 n. 11, 90 S.Ct. 1893. Under the revision of rule 16, the defendant is entitled to substantially enlarged discovery in federal cases, and it would seem appropriate to conclude that the rules will comply with the "reciprocal discovery" qualification of the *Williams* decision. [See, *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) was decided after the approval of proposed Rule 12.1 by the Judicial Conference of the United States. In that case the Court held the Oregon Notice-of-Alibi statute unconstitutional because of the failure to give the defendant adequate reciprocal discovery rights.]

(2) The court said that it did not consider the question of the "validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule." 399 U.S. at 83 n. 14, 90 S.Ct. 1893. This issue remains unresolved. [See *Wardius* v. *Oregon*, 412 U.S. at 472, Note 4, 93 S.Ct. 2208.] Rule 12.1(e) provides that the court may exclude the testimony of any witness whose name has not been disclosed pursuant to the requirements of the rule. The defendant may, however, testify himself. Prohibiting from testifying a witness whose name was not disclosed is a common provision in state statutes. See Epstein, *supra*, at 35. It is generally assumed that the sanction is essential if the notice-of-alibi rule is to have practical significance. See Epstein, *supra*, at 36. The use of the term "may" is intended to make clear that the judge may allow the alibi witness to testify if, under the particular circumstances, there is cause shown for the failure to conform to the requirements of the rules. This is further emphasized by subdivision (f) which provides for exceptions whenever "good cause" is shown for the exception.

The Supreme Court of Illinois recently upheld an Illinois statute which requires a defendant to give notice of his alibi witnesses although the prosecution is not required to disclose its alibi rebuttal witnesses. *People* v. *Holiday*, 47 Ill.2d 300, 265 N.E.2d 634 (1970). Because the defense complied with the requirement, the court did not have to consider the propriety of penalizing noncompliance.

The requirement of notice of alibi seems to be an increasingly common requirement of state criminal procedure. State statutes and court rules are cited in 399 U.S. at 82 n. 11, 90 S.Ct. 1893. See also Epstein, *supra*.

Rule 12.1 will serve a useful purpose even though rule 16 now requires disclosure of the names and addresses of government and defense witnesses. There are cases in which the identity of defense witnesses may be known, but it may come as a surprise to the government that they intend to testify as to an alibi and there may be no advance notice of the details of the claimed alibi. The result often is an unnecessary interruption and delay in the trial to enable the government to conduct an appropriate investigation. The objective of rule 12.1 is to prevent this by providing a mechanism which will enable the parties to have specific information in advance of trial to prepare to meet the issue of alibi during the trial.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 12.1 is a new rule that deals with the defense of alibi. It provides that a defendant must notify the government of his intention to rely upon the defense of alibi. Upon receipt of such notice, the government must advise the defendant of the specific time, date, and place at which the offense is alleged to have been committed. The defendant must then inform the government of the specific place at which he claims to have been when the offense is alleged to have been committed, and of the names and addresses of the witnesses on whom he intends to rely to establish his alibi. The government must then inform the defendant of the names and addresses of the witnesses on whom it will rely to establish the defendant's presence at the scene of the crime. If either party fails to comply with the provisions of the rule, the court may exclude the testimony of any witness whose identity is not disclosed. The rule does not attempt to limit the right of the defendant to testify in his own behalf.

B. Committee Action. The Committee disagrees with the defendant-triggered procedures of the rule proposed by the Supreme Court. The major purpose of a notice-of-alibi rule is to prevent unfair surprise to the prosecution.

The Committee, therefore, believes that it should be up to the prosecution to trigger the alibi defense discovery procedures. If the prosecution is worried about being surprised by an alibi defense, it can trigger the alibi defense discovery procedures. If the government fails to trigger the procedures and if the defendant raises an alibi defense at trial, then the government cannot claim surprise and get a continuance of the trial.

The Committee has adopted a notice-of-alibi rule similar to the one now used in the District of Columbia. [See Rule 2–5(b) of the Rules of the United States District Court for the District of Columbia. See also Rule 16–1 of the Rules of Criminal Procedure for the Superior Court of the District of Columbia.] The rule is prosecution-triggered. If the prosecutor notifies the defendant of the time, place, and date of the alleged offense, then the defendant has 10 days in which to notify the prosecutor of his intention to rely upon an alibi defense, specify where he claims to have been at the time of the alleged offense, and provide a list of his alibi witnesses. The prosecutor, within 10 days but no later than 10 days before trial, must then provide the defendant with a list of witnesses who will place the defendant at the scene of the alleged crime and those witnesses who will be used to rebut the defendant's alibi witnesses.

The Committee's rule does not operate only to the benefit of the prosecution. In fact, its rule will provide the defendant with more information than the rule proposed by the Supreme Court. The rule proposed by the Supreme Court permits the defendant to obtain a list of only those witnesses who will place him at the scene of the crime. The defendant, however, would get the names of these witnesses anyway as part of his discovery under Rule 16(a)(1)(E). The Committee rule not only requires the prosecution to provide the names of witnesses who place the defendant at the scene of the crime, but it also requires the prosecution to turn over the names of those witnesses who will be called in rebuttal to the defendant's alibi witnesses. This is information that the defendant is not otherwise entitled to discover.

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental Examination of Defendant. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure To Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his guilt.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

(Added Apr. 22, 1974, eff. Dec. 1, 1975; amended July 31, 1975, Pub.L. 94–64, § 3(14), 89 Stat. 373; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98–473, Title II, § 404(a), 98 Stat. 2067; Oct. 30, 1984, Pub.L. 98–596, § 11(a), 98 Stat. 3138.)

Codification. Amendments by 404(b), (c), and (d) of Pub. L. 98–473, which (1) deleted "other condition bearing upon the issue of whether he had the mental state required for the offense charged" in subdivision (b) and inserted in lieu thereof "any other mental condition bearing upon the issue of guilt", (2) deleted "to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court" in subdivision (c) and inserted in lieu thereof "to an examination pursuant to 18 U.S.C. 4242", and (3) deleted "mental state" in subdivision (d) and inserted in lieu thereof "guilt", have not been executed to text. Subsecs. (b) and (d) of section 404 of Pub.L. 98–473 were not executed because both subsections were repealed by Pub.L. 98–596, § 11(b), Oct. 30, 1984, 98 Stat. 3138. Subsec. (c) of section 404 of Pub.L. 98–473 was not executed to text since it called for the deletion of non-existent language incapable of literal exe-

cution and the insertion of language identical to that inserted by section 11(a)(1) of Pub.L. 98–596.

Effective Date of 1984 Amendment. Section 11(c) of Pub.L. 98–596, Oct. 30, 1984, 98 Stat. 3138, provided: "The amendments and repeals made by subsections (a) and (b) of this section [to this rule and to Pub.L. 98–473, Title II, § 404(b), (d), Oct. 12, 1984, 98 Stat. 2067] shall apply on and after the enactment of the joint resolution entitled 'Joint resolution making continuing appropriations for the fiscal year 1985, and for other purposes', H.J.Res. 648, Ninety-eighth Congress [Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 1837]."

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 12.2 is designed to require a defendant to give notice prior to trial of his intention (1) to rely upon the defense of insanity or (2) to introduce expert testimony of mental disease or defect on the theory that such mental condition is inconsistent with the mental state required for the offense charged. This rule does not deal with the issue of mental competency to stand trial.

The objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony. Failure to give advance notice commonly results in the necessity for a continuance in the middle of a trial, thus unnecessarily delaying the administration of justice.

A requirement that the defendant give notice of his intention to rely upon the defense of insanity was proposed by the Advisory Committee in the Second Preliminary Draft of Proposed Amendments (March 1964), rule 12.1, p. 7. The objective of the 1964 proposal was explained in a brief Advisory Committee Note:

Under existing procedure although insanity is a defense, once it is raised the burden to prove sanity beyond a reasonable doubt rests with the government. *Davis* v. *United States*, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895). This rule requires pretrial notice to the government of an insanity defense, thus permitting it to prepare to meet the issue. Furthermore, in *Lynch* v. *Overholser*, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962), the Supreme Court held that, at least in the face of a mandatory commitment statute, the defendant had a right to determine whether or not to raise the issue of insanity. The rule gives the defendant a method of raising the issue and precludes any problem of deciding whether or not the defendant relied on insanity.

The Standing Committee on Rules of Practice and Procedure decided not to recommend the proposed Notice of Insanity rule to the Supreme Court. Reasons were not given.

Requiring advance notice of the defense of insanity is commonly recommended as a desirable procedure. The Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, p. 254 (1970), state in part:

> It is recommended that procedural reform provide for advance notice that evidence of mental disease or defect will be relied upon in defense. . . .

Requiring advance notice is proposed also by the American Law Institute's Model Penal Code, § 4.03 (P.O.D. 1962). The commentary in Tentative Draft No. 4 at 193–194 (1955) indicates that, as of that time, six states required pretrial notice and an additional eight states required that the defense of insanity be specially pleaded.

For recent state statutes see N.Y. CPL § 250.10 (McKinney's Consol. Laws, c. 11–A, 1971) enacted in 1970 which provides that no evidence by a defendant of a mental disease negativing criminal responsibility shall be allowed unless defendant has served notice on the prosecutor of his intention to rely upon such defense. See also New Jersey Penal Code (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) § 2c: 4–3; New Jersey Court Rule 3:12; State v. Whitlow, 45 N.J. 3, 22 n. 3, 210 T.2d 763 (1965), holding the requirement of notice to be both appropriate and not in violation of the privilege against self-incrimination.

Subdivision (a) deals with notice of the "defense of insanity." In this context the term insanity has a well-understood meaning. See, e.g., Tydings, A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure, 27 Md.L.Rev. 131 (1967). Precisely how the defense of insanity is phrased does, however, differ somewhat from circuit to circuit. See Study Draft of a New Federal Criminal Code, § 503 Comment at 37 (USGPO 1970). For a more extensive discussion of present law, see Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, pp. 229–247 (USGPO 1970). The National Commission recommends the adoption of a single test patterned after the proposal of the American Law Institute's Model Penal Code. The proposed definition provides in part:

> In any prosecution for an offense lack of criminal responsibility by reason of mental disease or defect is a defense. [Study Draft of a New Federal Criminal Code § 503 at 36–37.]

Should the proposal of the National Commission be adopted by the Congress, the language of subdivision (a) probably ought to be changed to read "defense of lack of criminal responsibility by reason of mental disease or defect" rather than "defense of insanity."

Subdivision (b) is intended to deal with the issue of expert testimony bearing upon the issue of whether the defendant had the "mental state required for the offense charged."

There is some disagreement as to whether it is proper to introduce evidence of mental disease or defect bearing not upon the defense of insanity, but rather upon the existence of the mental state required by the offense charged. The American Law Institute's Model Penal Code takes the position that such evidence is admissible [§ 4.02(1) (P.O.D. 1962)]. See also *People* v. *Gorshen*, 51 Cal.2d 716, 336 P.2d 492 (1959).

The federal cases reach conflicting conclusions. See *Rhodes* v. *United States*, 282 F.2d 59, 62 (4th Cir. 1960):

> The proper way would have been to ask the witness to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or could have influenced his behavior, particularly his mental capacity knowingly to make the false statement charged, or knowingly to forge the signatures * * *.

Compare *Fisher* v. *United States*, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382 (1946).

Subdivision (b) does not attempt to decide when expert testimony is admissible on the issue of the requisite

mental state. It provides only that the defendant must give pretrial notice when he intends to introduce such evidence. The purpose is to prevent the need for a continuance when such evidence is offered without prior notice. The problem of unnecessary delay has arisen in jurisdictions which do not require prior notice of an intention to use expert testimony on the issue of mental state. Referring to this, the California Special Commission on Insanity and Criminal Offenders, First Report 30 (1962) said:

> The abuses of the present system are great. Under a plea of "not guilty" without any notice to the people that the defense of insanity will be relied upon, defendant has been able to raise the defense upon the trial of the issue as to whether he committed the offense charged.

As an example of the delay occasioned by the failure to heretofore require a pretrial notice by the defendant, see *United States* v. *Albright*, 388 F.2d 719 (4th Cir. 1968), where a jury trial was recessed for 23 days to permit a psychiatric examination by the prosecution when the defendant injected a surprise defense of lack of mental competency.

Subdivision (c) gives the court the authority to order the defendant to submit to a psychiatric examination by a psychiatrist designated by the court. A similar provision is found in ALI, Model Penal Code § 4.05(1) (P.O.D. 1962). This is a common provision of state law, the constitutionality of which has been sustained. Authorities are collected in ALI, Model Penal Code, pp. 195–196 Tent. Draft No. 4, (1955). For a recent proposal, see the New Jersey Penal Code § 2c: 4–5 (Final Report of the New Jersey Criminal Law Revision Commission, Oct. 1971) authorizing appointment of "at least one qualified psychiatrist to examine and report upon the mental condition of the defendant." Any issue of self-incrimination which might arise can be dealt with by the court as, for example, by a bifurcated trial which deals separately with the issues of guilt and of mental responsibility. For statutory authority to appoint a psychiatrist with respect to competency to stand trial, see 18 U.S.C. § 4244.

Subdivision (d) confers authority on the court to exclude expert testimony in behalf of a defendant who has failed to give notice under subdivision (b) or who refuses to be examined by a court-appointed psychiatrist under subdivision (c). See *State* v. *Whitlow*, 45 N.J. 3, 23, 210 A.2d 763 (1965), which indicates that it is proper to limit or exclude testimony by a defense psychiatrist whenever defendant refuses to be examined.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 12.2 is a new rule that deals with defense based upon mental condition. It provides that: (1) The defendant must notify the prosecution in writing of his intention to rely upon the defense of insanity. If the defendant fails to comply, "insanity may not be raised as a defense." (2) If the defendant intends to introduce expert testimony relating to mental disease or defect on the issue whether he had the requisite mental state, he must notify the prosecution in writing. (3) The court, on motion of the prosecution, may order the defendant to submit to a psychiatric examination by a court-appointed psychiatrist. (4) If the defendant fails to undergo the court-ordered psychiatric examination, the court may exclude any expert witness the defendant offers on the issue of his mental state.

B. Committee Action. The Committee agrees with the proposed rule but has added language concerning the use of statements made to a psychiatrist during the course of a psychiatric examination provided for by Rule 12.2. The language provides:

> No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused before the judge who or jury which determines the guilt of the accused, prior to the determination of guilt.

The purpose of this rule is to secure the defendant's fifth amendment right against self-incrimination. See *State* v. *Raskin*, 34 Wis.2d 607, 150 N.W.2d 318 (1967). The provision is flexible and does not totally preclude the use of such statements. For example, the defendant's statement can be used at a separate determination of the issue of sanity or for sentencing purposes once guilt has been determined. A limiting instruction to the jury in a single trial to consider statements made to the psychiatrist only on the issue of sanity would not satisfy the requirements of the rule as amended. The prejudicial effect on the determination of guilt would be inescapable.

The Committee notes that the rule does not attempt to resolve the issue whether the court can constitutionally compel a defendant to undergo a psychiatric examination when the defendant is unwilling to undergo one. The provisions of subdivision (c) are qualified by the phrase, "In an appropriate case." If the court cannot constitutionally compel an unwilling defendant to undergo a psychiatric examination, then the provisions of subdivision (c) are inapplicable in every instance where the defendant is unwilling to undergo a court-ordered psychiatric examination. The Committee, by its approval of subdivision (c), intends to take no stand whatever on the constitutional question.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94–414

Rule 12.2(c) deals with court-ordered psychiatric examinations. The House version provides that no statement made by a defendant during a court-ordered psychiatric examination could be admitted in evidence against the defendant before the trier of fact that determines the issue of guilt prior to the determination of guilt. The Senate version deletes this provision.

The Conference adopts a modified House provision and restores to the bill the language of H.R. 6799 as it was originally introduced. The Conference adopted language provides that no statement made by the defendant during a psychiatric examination provided for by the rule shall be admitted against him on the issue of guilt in any criminal proceeding.

The Conference believes that the provision in H.R. 6799 as originally introduced in the House adequately protects the defendant's fifth amendment right against self-incrimination. The rule does not preclude use of statements made by a defendant during a court-ordered psy-

chiatric examination. The statements may be relevant to the issue of defendant's sanity and admissable on that issue. However, a limiting instruction would not satisfy the rule if a statement is so prejudicial that a limiting instruction would be ineffective. Cf. Practice under 18 U.S.C. 4244.

1983 AMENDMENT

Rule 12.2(b)

Courts have recently experienced difficulty with the question of what kind of expert testimony offered for what purpose falls within the notice requirement of rule 12.2(b). See, e.g., *United States* v. *Hill*, 655 F.2d 512 (3d Cir. 1980) (rule not applicable to tendered testimony of psychologist concerning defendant's susceptibility of inducement, offered to reinforce defendant's entrapment defense); *United States* v. *Webb*, 625 F.2d 709 (5th Cir. 1980) (rule not applicable to expert testimony tendered to show that defendant lacked the "propensity to commit a violent act," as this testimony was offered "to prove that Webb did not commit the offense charged," shooting at a helicopter, "not that certain conduct was unaccompanied by criminal intent"); *United States* v. *Perl*, 584 F.2d 1316 (4th Cir. 1978) (because entrapment defense properly withheld from jury, it was unnecessary to decide if the district court erred in holding rule applicable to tendered testimony of the doctor that defendant had increased susceptibility to suggestion as a result of medication he was taking); *United States* v. *Olson*, 576 F.2d 1267 (8th Cir. 1978) (rule applicable to tendered testimony of an alcoholism and drug therapist that defendant was not responsible for his actions because of a problem with alcohol); *United States* v. *Staggs*, 553 F.2d 1073 (7th Cir. 1977) (rule applicable to tendered testimony of psychologist that defendant, charged with assaulting federal officer, was more likely to hurt himself than to direct his aggressions toward others, as this testimony bears upon whether defendant intended to put victim in apprehension when he picked up the gun).

What these cases illustrate is that expert testimony about defendant's mental condition may be tendered in a wide variety of circumstances well beyond the situation clearly within rule 12.2(b), i.e., where a psychiatrist testifies for the defendant regarding his diminished capacity. In all of these situations and others like them, there is good reason to make applicable the notice provisions of rule 12.2(b). This is because in all circumstances in which the defendant plans to offer expert testimony concerning his mental condition at the time of the crime charged, advance disclosure to the government will serve "to permit adequate pretrial preparation, to prevent surprise at trial, and to avoid the necessity of delays during trial." 2 *A.B.A. Standards for Criminal Justice* 11-55 (2d 1980). Thus, while the district court in *United States* v. *Hill*, 481 F.Supp. 558 (E.D.Pa. 1979), incorrectly concluded that present rule 12.2(b) covers testimony by a psychologist bearing on the defense of entrapment, the court quite properly concluded that the government would be seriously disadvantaged by lack of notice. This would have meant that the government would not have been equipped to cross-examine the expert, that any expert called by the government would not have had an opportunity to hear the defense expert testify, and that the government would not have had an opportunity to conduct the kind of investigation needed to acquire rebuttal testimony on defendant's claim that he was especially susceptible to inducement. Consequently, rule 12.2(b) has been expanded to cover all of the aforementioned situations.

Rule 12.2(c)

The amendment of the first sentence of subdivision (c), recognizing that the government may seek to have defendant subjected to a mental examination by an expert other than a psychiatrist, is prompted by the same considerations discussed above. Because it is possible that the defendant will submit to examination by an expert of his own other than a psychiatrist, it is necessary to recognize that it will sometimes be appropriate for defendant to be examined by a government expert other than a psychiatrist.

The last sentence of subdivision (c) has been amended to more accurately reflect the Fifth Amendment considerations at play in this context. See *Estelle* v. *Smith*, 451 U.S. 454 (1981), holding that self-incrimination protections are not inevitably limited to the guilt phase of a trial and that the privilege, when applicable, protects against use of defendant's statement and also the fruits thereof, including expert testimony based upon defendant's statements to the expert. *Estelle* also intimates that "a defendant can be required to submit to a sanity examination," and presumably some other form of mental examination, when "his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case."

Rule 12.2(d)

The broader term "mental condition" is appropriate here in light of the above changes to subdivisions (b) and (c).

Rule 12.2(e)

New subdivision (e), generally consistent with the protection afforded in rule 12.1(f) with respect to notice of alibi, ensures that the notice required under subdivision (b) will not deprive the defendant of an opportunity later to elect not to utilize any expert testimony. This provision is consistent with *Williams* v. *Florida*, 399 U.S. 78 (1970), holding the privilege against self-incrimination is not violated by requiring the defendant to give notice of a defense where the defendant retains the "unfettered choice" of abandoning the defense.

Rule 13. Trial Together of Indictments or Informations

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is substantially a restatement of existing law, 18 U.S.C. former § 557 (Indictments and presentments; joinder of charges); *Logan* v. *United States*, 144 U.S. 263, 296, 12 S.Ct. 617, 36 L.Ed. 429; *Showalter* v. *United*

States, 260 Fed. 719, C.C.A.4th, certiorari denied 250 U.S. 672, 40 S.Ct. 14, 63 L.Ed. 1200; *Hostetter* v. *United States*, 16 F.2d 921, C.C.A.8th; *Capone* v. *United States*, 51 F.2d 609, 619–620, C.C.A.7th.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial. (As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is a restatement of existing law under which severance and other similar relief is entirely in the discretion of the court, 18 U.S.C. former § 557 (Indictments and presentments; joinder of charges); *Pointer* v. *United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208; *Pierce* v. *United States*, 160 U.S. 355, 16 S.Ct. 321, 40 L.Ed. 454; *United States* v. *Ball*, 163 U.S. 662, 673, 16 S.Ct. 1192, 41 L.Ed. 300; *Stilson* v. *United States*, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154.

1966 AMENDMENT

A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. While the question whether to grant a severance is generally left within the discretion of the trial court, recent Fifth Circuit cases have found sufficient prejudice involved to make denial of a motion for severance reversible error. See *Schaffer* v. *United States*, 221 F.2d 17 (5th Cir. 1955); *Barton* v. *United States*, 263 F.2d 894 (5th Cir. 1959). It has even been suggested that when the confession of the co-defendant comes as a surprise at the trial, it may be error to deny a motion or a mistrial. See *Belvin* v. *United States*, 273 F.2d 583 (5th Cir. 1960).

The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trials. Cf. note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 551, 565 (1965).

Rule 15. Depositions

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in

the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(15)-(19), 89 Stat. 373, 374; Oct. 12, 1984, Pub.L. 98-473, Title II, § 209(b), 98 Stat. 1986.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under dedimus potestatem and in perpetuam rei memoriam, 28 U.S.C. former § 644. This statute has been generally held applicable to criminal cases, *Clymer* v. *United States*, 38 F.2d 581, C.C.A.10th; *Wong Yim* v. *United States*, 118 F.2d 667, C.C.A.9th, certiorari denied 313 U.S. 589, 61 S.Ct. 1112, 85 L.Ed. 1544; *United States* v. *Cameron*, 15 Fed. 794, C.C.E.D. Mo.; *United States* v. *Hofmann*, 24 F.Supp. 847, S.D. N.Y. Contra, *Luxemberg* v. *United States*, 45 F.2d 497, C.C.A.4th, certiorari denied 283 U.S. 820, 51 S.Ct. 345, 75 L.Ed. 1436. The rule continues the limitation of the statute that the taking of depositions is to be restricted to cases in which they are necessary "in order to prevent a failure of justice."

2. Unlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court (Rules 26(a) and 30, Federal Rules of Civil Procedure, 28 U.S.C., Appendix), this rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all parties. It was contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the practice heretofore.

3. This rule introduces a new feature in authorizing the taking of the deposition of a witness committed for failure to give bail (see Rule 46(b)). This matter is, however, left to the discretion of the court. The purpose of the rule is to afford a method of relief for such a witness, if the court finds it proper to extend it.

Note to Subdivision (b). This subdivision, as well as subdivisions (d) and (f), sets forth the procedure to be followed in the event that the court grants an order for the taking of a deposition. The procedure prescribed is similar to that in civil cases, Rules 28-31, Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (c). This rule introduces a new feature for the purpose of protecting the rights of an indigent defendant.

Note to Subdivision (d). See Note to Subdivision (b), supra.

Note to Subdivision (e). In providing when and for what purpose a deposition may be used at the trial, this rule generally follows the corresponding provisions of the Federal Rules of Civil Procedure, Rule 26(d)(3), 28 U.S.C., Appendix. The only difference is that in civil cases a deposition may be introduced at the trial if the witness is at a greater distance than 100 miles from the place of trial, while this rule requires that the witness be out of the United States. The distinction results from the fact that a subpoena in a civil case runs only within the district where issued or 100 miles from the place of trial (Rule 45(e)(1), Federal Rules of Civil Procedure, 28 U.S.C., Appendix), while a subpoena in a criminal case runs throughout the United States (see Rule 17(e)(1), infra).

Note to Subdivision (f). See Note to Subdivision (b), supra.

1974 AMENDMENT

Rule 15 authorizes the taking of depositions by the government. Under former rule 15 only a defendant was authorized to take a deposition.

The revision is similar to Title VI of the Organized Crime Control Act of 1970. The principal difference is that Title VI (18 U.S.C. § 3503) limits the authority of the government to take depositions to cases in which the Attorney General certifies that the "proceeding is against a person who is believed to have participated in an organized criminal activity." This limitation is not contained in rule 15.

Dealing with the issue of government depositions so soon after the enactment of 18 U.S.C. § 3503 is not inconsistent with the congressional purpose. On the floor of the House, Congressman Poff, a principal spokesman for the proposal, said that the House version was not designed to "limit the Judicial Conference of the United States in the exercise of its rule-making authority . . . from addressing itself to other problems in this area or from adopting a broader approach." 116 Cong.Rec. 35293 (1970).

The recently enacted Title VI of the Organized Crime Control Act of 1970 (18 U.S.C. § 3503) is based upon earlier efforts of the Advisory Committee on Criminal Rules which has over the past twenty-five years submitted several proposals authorizing government depositions.

The earlier drafts of the Federal Rules of Criminal Procedure proposed that the government be allowed to take depositions. Orfield, The Federal Rules of Criminal Procedure, 33 Calif.L.Rev. 543, 559 (1945). The Fifth Draft of what became rule 15 (then rule 20) dated June 1942, was submitted to the Supreme Court for comment. The court had a number of unfavorable comments about allowing government depositions. These comments were not published. The only reference to the fact that the court made comments is in 2 Orfield, Criminal Procedure under the Federal Rules § 15:1 (1966); and Orfield, Depositions in Federal Criminal Procedure, 9 S.C.L.Q. 376, 380–381 (1957).

The Advisory Committee, in the 1940's, continued to recommend the adoption of a provision authorizing government depositions. The final draft submitted to the Supreme Court contained a section providing:

The following additional requirements shall apply if the deposition is taken at the instance of the government or of a witness. The officer having custody of a defendant shall be notified of the time and place set for examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The government shall pay in advance to the defendant's attorney and a defendant not in custody expenses of travel and subsistence for attendance at the examination.

See 2 Orfield, Criminal Procedure under the Federal Rules § 15:3, pp. 447–448 (1966); Orfield, Depositions in Federal Criminal Procedure, 9 S.C.L.Q. 376, 383 (1957).

The Supreme Court rejected this section in this entirety, thus eliminating the provision for depositions by the government. These changes were made without comment.

The proposal to allow government depositions was renewed in the amendments to the Federal Rules of Criminal Procedure in the early 1960's. The Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (December 1962) proposed to amend rule 15 by eliminating the words "of a defendant" from the first sentence of subdivision (a) and adding a subdivision (g) which was practically identical to the subdivision rejected by the Supreme Court in the original draft of the rules.

The Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (March 1964) continued to propose allowing governments depositions. Subdivision (g) was substantially modified, however.

The following additional requirements shall apply if the deposition is taken at the instance of the government or a witness. Both the defendant and his attorney shall be given reasonable advance notice of the time and place set for the examination. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination but his failure to appear after notice and tender of expenses shall constitute a waiver of that right. The government shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination. The government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and which the government would be required to make available to the defendant if the witness were testifying at the trial.

The proposal to authorize government depositions was rejected by the Standing Committee on Rules of Practice and Procedure, C. Wright, Federal Practice and Procedure § 241 at 477 (1969). 4 Barron, Federal Practice and Procedure (Supp. 1967). The Report of the Judicial Conference, submitted to the Supreme Court for approval late in 1965, contained no proposal for an amendment to rule 15. See 39 F.R.D. 69, 168–211 (1966).

When the Organized Crime Control Act of 1970 was originally introduced in the Senate (S. 30) it contained a government deposition provision which was similar to the 1964 proposal of the Criminal Rules Advisory Committee, except that the original bill (S. 30) failed to provide standards to control the use of depositions at the trial. For an explanation and defense of the original proposal see McClellan, The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Lawyer 55, 100–108 (1970). This omission was remedied, prior to passage, with the addition of what is now 18 U.S.C. § 3503(f) which prescribes the circumstances in which a deposition can be used. The standards are the same as those in former rule 15(e) with the addition of language allowing the use of the deposition when "the witness refuses in the trial or hearing to testify concerning the subject of the deposition or the part offered."

Before the Organized Crime Control Act of 1970 was enacted an additional amendment was added providing that the right of the government to take a deposition is limited to cases in which the Attorney General certifies that the defendant is "believed to have participated in an organized criminal activity" [18 U.S.C. § 3503(a)]. The argument in favor of the amendment was that the whole purpose of the act was to deal with organized crime and therefore its provisions, including that providing for government depositions, should be limited to organized crime type cases.

There is another aspect of Advisory Committee history which is relevant. In January 1970, the Advisory Committee circulated proposed changes in rule 16, one of which gives the government, when it has disclosed the identity of its witnesses, the right to take a deposition and use it "in the event the witness has become unavailable without the fault of the government or if the witness has changed his testimony." [See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, rule 16(a)(1)(vi) (January 1970).] This provision is now incorporated within rule 16(a)(1)(v).

Because neither the court nor the standing committee gave reasons for rejecting the government deposition proposal, it is not possible to know why they were not approved. To the extent that the rejection was based upon doubts as to the constitutionality of such a proposal, those doubts now seem resolved by *California* v. *Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

On the merits, the proposal to allow the government to take depositions is consistent with the revision of rule 16 and with section 804(b)(1) of the Rules of Evidence for the United States Courts and Magistrates (November 1971) which provides that the following is not excluded by the hearsay rule if the declarant is unavailable:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Subdivision (a) is revised to provide that the government as well as the defendant is entitled to take a deposition. The phrase "whenever due to special circumstances of the case it is in the interest of justice," is intended to make clear that the decision by the court as to whether to order the taking of a deposition shall be made in the context of the circumstances of the particular case. The principal objective is the preservation of evidence for use at trial. It is not to provide a method of pretrial discovery nor primarily for the purpose of obtaining a basis for later cross-examination of an adverse witness. Discovery is a matter dealt with in rule 16. An obviously important factor is whether a deposition will expedite, rather than delay, the administration of criminal justice. Also important is the presence or absence of factors which determine the use of a deposition at the trial, such as the agreement of the parties to use of the deposition; the possible unavailability of the witness; or the possibility that coercion may be used upon the witness to induce him to change his testimony or not to testify. See rule 16(a)(1)(v).

Subdivision (a) also makes explicit that only the "testimony of a prospective witness of a party" can be taken. This means the party's own witness and does not authorize a discovery deposition of an adverse witness. The language "for use at trial" is intended to give further emphasis to the importance of the criteria for use specified in subdivision (e).

In subdivision (b) reference is made to the defendant in custody. If he is in state custody, a writ of habeas corpus ad testificandum (to produce the prisoner for purposes of testimony) may be required to accomplish his presence.

In subdivision (d) the language "except as otherwise provided in these rules" is meant to make clear that the subpoena provisions of rule 17 control rather than the provisions of the civil rules.

The use of the phrase "and manner" in subdivision (d)(2) is intended to emphasize that the authorization is not to conduct an adverse examination of an opposing witness.

In subdivision (e) the phrase "as substantive evidence" is added to make clear that the deposition can be used as evidence in chief as well as for purposes of impeachment.

Subdivision (e) also makes clear that the deposition can be used as affirmative evidence whenever the witness is available but gives testimony inconsistent with that given in the deposition. A California statute which contained a similar provision was held constitutional in *California* v. *Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). This is also consistent with section 801(d)(1) of the Rules of Evidence for United States Courts and Magistrates (Nov. 1971).

Subdivision (f) is intended to insure that a record of objections and the grounds for the objections is made at the time the deposition is taken when the witness is available so that the witness can be examined further, if necessary, on the point of the objection so that there will be an adequate record for the court's later ruling upon the objection.

Subdivision (g) uses the "unavailability" definition of the Rules of Evidence for the United States Courts and Magistrates, 804(a) (Nov. 1971).

Subdivision (h) is intended to make clear that the court always has authority to order the taking of a deposition, or to allow the use of a deposition, where there is an agreement of the parties to the taking or to the use.

NOTES OF COMMITTEE ON THE JUDICIARY. HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 15 of the Federal Rules of Criminal Procedure provides for the taking of depositions. The present rule permits only the defendant to move that a deposition of a prospective witness be taken. The court may grant the motion if it appears that (a) the prospective witness will be unable to attend or be prevented from attending the trial, (b) the prospective witness' testimony is material, and (c) the prospective witness' testimony is necessary to prevent a failure of justice.

The Supreme Court promulgated several amendments to Rule 15. The more significant amendments are described below.

Subdivision (a) as proposed to be amended permits either party to move the court for the taking of a deposition of a witness. However, a party may only move to take the deposition of one of its own witnesses, not one of the adversary party's witnesses.

Subdivision (c) as proposed to be amended provides that whenever a deposition is taken at the instance of the government or of an indigent defendant, the expenses of the taking of the deposition must be paid by the government.

Subdivision (e) as proposed to be amended provides that part or all of the deposition may be used at trial as substantive evidence if the witness is "unavailable" or if the witness gives testimony inconsistent with his deposition.

Subdivision (b)[1] as proposed to be amended defines "unavailable." "Unavailable" as a witness includes situations in which the deponent:

(1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; or

(2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or

(3) testifies to a lack of memory of the subject matter of his deposition; or

1. So in original. Probably should be "(g)".

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means. A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

B. Committee Action. The Committee narrowed the definition of "unavailability" in subdivision (g). The Committee deleted language from that subdivision that provided that a witness was "unavailable" if the court exempts him from testifying at the trial on the ground of privilege. The Committee does not want to encourage the use of depositions at trial, especially in view of the importance of having live testimony from a witness on the witness stand.

The Committee added a provision to subdivision (b) to parallel the provision of Rule 43(b)(2). This is to make it clear that a disruptive defendant may be removed from the place where a deposition is being taken.

The Committee added language to subdivision (c) to make clear that the government must pay for the cost of the transcript of a deposition when the deposition is taken at the instance of an indigent defendant or of the government. In order to use a deposition at trial, it must be transcribed. The proposed rule did not explicitly provide for payment of the cost of transcribing, and the Committee change rectifies this.

The Committee notes that subdivision (e) permits the use of a deposition when the witness "gives testimony at the trial or hearing inconsistent with his deposition." Since subdivision (e) refers to the rules of evidence, the Committee understands that the Federal Rules of Evidence will govern the admissibility and use of the deposition. The Committee, by adopting subdivision (e) as proposed to be amended by the Supreme Court, intends the Federal Rules of Evidence to govern the admissibility and use of the deposition.

The Committee believes that Rule 15 will not encourage trials by deposition. A deposition may be taken only in "exceptional circumstances" when "it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved. * * *" A deposition, once it is taken, is not automatically admissible at trial, however. It may only be used at trial if the witness is unavailable, and the rule narrowly defines unavailability. The procedure established in Rule 15 is similar to the procedure established by the Organized Crime Control Act of 1970 for the taking and use of depositions in organized crime cases. See 18 U.S.C. 3503.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94-414

Rule 15 deals with the taking of depositions and the use of depositions at trial. Rule 15(e) permits a deposition to be used if the witness is unavailable. Rule 15(g) defines that term.

The Supreme Court's proposal defines five circumstances in which the witness will be considered unavailable. The House version of the bill deletes a provision that said a witness is unavailable if he is exempted at trial, on the ground of privilege, from testifying about the subject matter of his deposition. The Senate version of the bill by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the

preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(20)-(28), 89 Stat. 374, 375; Dec. 12, 1975, Pub.L. 94-149, § 5, 89 Stat. 806; Apr. 28, 1983, eff. Aug. 1, 1983.)

AMENDMENTS

1975—Subd. (a)(1). Pub.L. 94-64 amended subpars. (A), (B), and (D) generally, and deleted subpar. (E).

Subd. (a)(4). Pub.L. 94-149 deleted par. (4) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness."

Subd. (b)(1). Pub.L. 94-64 amended subpars. (A) and (B) generally, and deleted subpar. (C).

Subd. (b)(3). Pub.L. 94-149 deleted par. (3) reading "Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for a comment upon a failure to call a witness."

Subd. (c). Pub.L. 94-64 amended subd. (c) generally.

Subd. (d)(1). Pub.L. 94-64 amended par. (1) generally.

NOTES OF ADVISORY COMMITTEE ON RULES

Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States* v. *Rosenfeld*, 57 F.2d 74, C.C.A.2d, certiorari denied, 286 U.S. 556, 52 S.Ct. 642, 76 L.Ed. 1290. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States* v. *B. Goedde and Co.*, 40 Fed.Supp. 523, 534, E.D.Ill. The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court.

1966 AMENDMENT

The extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature, most of which has been in favor of increasing the range of permissible discovery. See, e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash.U.L.Q. 279; Everett, Discovery in Criminal Cases—In Search of a Standard, 1964 Duke L.J. 477; Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan.L.Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1172-1198 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb.L.Rev. 127 (1962); Louisell, Criminal Discovery: Dilemma Real or Apparent, 49 Calif. L.Rev. 56 (1961); Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law, 14 Vand.L.Rev. 921 (1961); Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant? 51 A.B.A.J. 64 (1965); Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 1051-1063. Full judicial exploration of the conflicting policy considerations will be found in *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881 (1953) and *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); cf. *State* v. *Murphy*, 36 N.J. 172, 175 A.2d 622 (1961); *State* v. *Moffa*, 36 N.J. 219, 176 A.2d 1 (1961). The rule has been revised to expand the scope of pretrial discovery. At the same time provisions are made to guard against possible abuses.

Subdivision (a).—The court is authorized to order the attorney for the government to permit the defendant to inspect and copy or photograph three different types of material:

(1) Relevant written or recorded statements or confessions made by the defendant, or copies thereof. The defendant is not required to designate because he may not always be aware that his statements or confessions are being recorded. The government's obligation is limited to production of such statements as are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. Discovery of statements and confessions is in line with what the Supreme Court has described as the "better practice" (*Cicenia* v. *LaGay*, 357 U.S. 504, 511 (1958)), and with the law in a number of states. See e.g., Del. Rules Crim. Proc., Rule 16; Ill.Stat. Ch. 38, § 729; Md. Rules Proc., Rule 728; *State* v. *McGee*, 91 Ariz. 101, 370 P.2d 261 (1962); *Cash* v. *Superior Court*, 53 Cal.2d 72, 346 P.2d 407 (1959); *State* v. *Bickham*, 239 La. 1094, 121 So.2d 207, cert. den. 364 U.S. 874 (1960); *People* v. *Johnson*, 356 Mich. 619, 97 N.W.2d 739 (1959); *State* v. *Johnson*, supra; *People* v. *Stokes*, 24 Miss.2d 755, 204 N.Y.Supp.2d 827 (Ct. Gen. Sess. 1960). The amendment also makes it clear that discovery extends to recorded as well as written statements. For state cases upholding the discovery of recordings, see, e.g., *People* v. *Cartier*, 51 Cal.2d 590, 335 P.2d 114 (1959); *State* v. *Minor*, 177 A.2d 215 (Del. Super. Ct. 1962).

(2) Relevant results or reports of physical or mental examinations, and of scientific tests or experiments (including fingerprint and handwriting comparisons) made in connection with the particular case, or copies thereof. Again the defendant is not required to designate but the government's obligation is limited to production of items within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. With respect to results or reports of scientific tests or experiments the range of materials which must be produced by the government is further limited to those made in connection with the particular case. Cf. Fla. Stats. § 909.18; *State* v. *Superior Court*, 90 Ariz. 133, 367 P.2d 6 (1961); *People* v. *Cooper*, 53 Cal.2d 755, 770, 3 Cal.Rptr. 148, 157, 349 P.2d 1964, 973 (1960); *People* v. *Stokes*, supra, at 762, 204 N.Y.Supp.2d at 835.

(3) Relevant recorded testimony of a defendant before a grand jury. The policy which favors pretrial disclosure to a defendant of his statements to government agents also supports, pretrial disclosure of his testimony before a grand jury. Courts, however, have tended to require a showing of special circumstances before ordering such disclosure. See, e.g., *United States* v. *Johnson*, 215

F.Supp. 300 (D. Md. 1963). Disclosure is required only where the statement has been recorded and hence can be transcribed.

Subdivision (b).—This subdivision authorizes the court to order the attorney for the government to permit the defendant to inspect the copy or photograph all other books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government. Because of the necessarily broad and general terms in which the items to be discovered are described, several limitations are imposed:

(1) While specific designation is not required of the defendant, the burden is placed on him to make a showing of materiality to the preparation of his defense and that his request is reasonable. The requirement of reasonableness will permit the court to define and limit the scope of the government's obligation to search its files while meeting the legitimate needs of the defendant. The court is also authorized to limit discovery to portions of items sought.

(2) Reports, memoranda, and other internal government documents made by government agents in connection with the investigation or prosecution of the case are exempt from discovery. Cf. *Palermo* v. *United States*, 360 U.S. 343 (1959); *Ogden* v. *United States*, 303 F.2d 724 (9th Cir. 1962).

(3) Except as provided for reports of examinations and tests in subdivision (a)(2), statements made by government witnesses or prospective government witnesses to agents of the government are also exempt from discovery except as provided by 18 U.S.C. § 3500.

Subdivision (c).—This subdivision permits the court to condition a discovery order under subdivision (a)(2) and subdivision (b) by requiring the defendant to permit the government to discover similar items which the defendant intends to produce at the trial and which are within his possession, custody or control under restrictions similar to those placed in subdivision (b) upon discovery by the defendant. While the government normally has resources adequate to secure the information necessary for trial, there are some situations in which mutual disclosure would appear necessary to prevent the defendant from obtaining an unfair advantage. For example, in cases where both prosecution and defense have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses. Or in cases (such as antitrust cases) in which the defendant is well represented and well financed, mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases. State cases have indicated that a requirement that the defendant disclose in advance of trial materials which he intends to use on his own behalf at the trial is not a violation of the privilege against self-incrimination. See *Jones* v. *Superior Court*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 246 (1964); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv.Rev. 828 (1963).

Subdivision (d).—This subdivision is substantially the same as the last sentence of the existing rule.

Subdivision (e).—This subdivision gives the court authority to deny, restrict or defer discovery upon a sufficient showing. Control of the abuses of discovery is necessary if it is to be expanded in the fashion proposed in subdivisions (a) and (b). Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals.

For an example of a use of a protective order in state practice, see *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963). See also Brennan, Remarks on Discovery, 33 F.R.D. 56, 65 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 244, 250.

In some cases it would defeat the purpose of the protective order if the government were required to make its showing in open court. The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant, Cf. 18 U.S.C. § 3500.

Subdivision (f).—This subdivision is designed to encourage promptness in making discovery motions and to give the court sufficient control to prevent unnecessary delay and court time consequent upon a multiplication of discovery motions. Normally one motion should encompass all relief sought and a subsequent motion permitted only upon a showing of cause. Where pretrial hearings are used pursuant to Rule 17.1, discovery issues may be resolved at such hearings.

Subdivision (g).—The first sentence establishes a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The duty provided is to notify the other party, his attorney or the court of the existence of the material. A motion can then be made by the other party for additional discovery and, where the existence of the material is disclosed shortly before or during the trial, for any necessary continuance.

The second sentence gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

1974 AMENDMENT

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view

that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43–46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

Subdivision (a)(1)(A) amends the old rule to provide, upon request of the defendant, the government shall permit discovery if the conditions specified in subdivision (a)(1)(A) exist. Some courts have construed the current language as giving the court discretion as to whether to grant discovery of defendant's statements. See *United States* v. *Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967), denying discovery because the defendant did not demonstrate that his request for discovery was warranted; *United States* v. *Diliberto*, 264 F.Supp. 181 (S.D.N.Y. 1967), holding that there must be a showing of actual need before discovery would be granted; *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967), holding that in the absence of a showing of good cause the government cannot be required to disclose defendant's prior statements in advance of trial. In *United States* v. *Louis Carreau, Inc.*, at p. 412, the court stated that if rule 16 meant that production of the statements was mandatory, the word "shall" would have been used instead of "may." See also *United States* v. *Wallace*, 272 F.Supp. 838 (S.D.N.Y. 1967); *United States* v. *Wood*, 270 F.Supp. 963 (S.D.N.Y. 1967); *United States* v. *Leighton*, 265 F.Supp. 27 (S.D.N.Y. 1967); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968); and the discussion of discovery in Discovery in Criminal Cases, 44 F.R.D. 481 (1968). Other courts have held that even though the current rules make discovery discretionary, the defendant need not show cause when he seeks to discover his own statements. See *United States* v. *Aadal*, 280 F.Supp. 859 (S.D.N.Y. 1967); *United States* v. *Federmann*, 41 F.R.D. 339 (S.D.N.Y. 1967); and *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1)(A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. See C. Wright, Federal Practice and Procedure: Criminal § 253 (1969, Supp. 1971), Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276 (1966); Fla.Stat.Ann. § 925.05 (Supp. 1971–1972); N.J.Crim.Prac. Rule 35–11(a) (1967). This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) has unanimously recommended broader discovery. The United States Supreme Court has said that the pretrial disclosure of a defendant's statements "may be the 'better practice.'" *Cicenia* v. *La Gay*, 357 U.S. 504, 511, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958). See also *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952); *State* v. *Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

The requirement that the statement be disclosed prior to trial, rather than waiting until the trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. See *United States* v. *Projansky*, supra. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. See ABA, Standards Relating to Discovery and Procedure Before Trial § 1.2 and Commentary pp. 40–43 (Approved Draft, 1970).

The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant. The proposed draft requires the defendant to request discovery, although obviously the attorney for the government may disclose without waiting for a request, and there are situations in which due process will require the prosecution, on its own, to disclose evidence "helpful" to the defense. *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

The requirement in subdivision (a)(1)(A) is that the government produce "statements" without further discussion of what "statement" includes. There has been some recent controversy over what "statements" are subject to discovery under the current rule. See Discovery in Criminal Cases, 44 F.R.D. 481 (1968); C. Wright, Federal Practice and Procedure: Criminal § 253, pp. 505–506 (1969, Supp. 1971). The kinds of "statements" which have been held to be within the rule include "substantially verbatim and contemporaneous" statements, *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967); statements which reproduce the defendant's "exact words," *United States* v. *Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); a memorandum which was not verbatim but included the substance of the defendant's testimony, *United States* v. *Scharf*, 267 F.Supp. 19 (S.D.N.Y. 1967); Summaries of the defendant's statements, *United States* v. *Morrison*, 43 F.R.D. 516 (N.D.Ill.1967); and statements discovered

by means of electronic surveillance, *United States* v. *Black*, 282 F.Supp. 35 (D.D.C. 1968). The court in *United States* v. *Iovinelli*, 276 F.Supp. 629, 631 (N.D.Ill.1967), declared that "statements" as used in old rule 16 is not restricted to the "substantially verbatim recital of an oral statement" or to statements which are a "recital of past occurrences."

The Jencks Act, 18 U.S.C. § 3500, defines "statements" of government witnesses discoverable for purposes of cross-examination as: (1) a "written statement" signed or otherwise approved by a witness, (2) "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e). The language of the Jencks Act has most often led to a restrictive definition of "statements," confining "statements" to the defendant's "own words." See *Hanks* v. *United States*, 388 F.2d 171 (10th Cir. 1968), and *Augenblick* v. *United States*, 377 F.2d 586, 180 Ct.Cl. 131 (1967).

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) do not attempt to define "statements" because of a disagreement among members of the committee as to what the definition should be. The majority rejected the restrictive definition of "statements" contained in the Jencks Act, 18 U.S.C. § 3500(e), in the view that the defendant ought to be able to see his statement in whatever form it may have been preserved in fairness to the defendant and to discourage the practice, where it exists, of destroying original notes, after transforming them into secondary transcriptions, in order to avoid cross-examination based upon the original notes. See *Campbell* v. *United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963). The minority favored a restrictive definition of "statements" in the view that the use of other than "verbatim" statements would subject witnesses to unfair cross-examination. See American Bar Association's Standards Relating to Discovery and Procedure Before Trial pp. 61–64 (Approved Draft, 1970). The draft of subdivision (a)(1)(A) leaves the matter of the meaning of the term unresolved and thus left for development on a case-by-case basis.

Subdivision (a)(1)(A) also provides for mandatory disclosure of a summary of any oral statement made by defendant to a government agent which the attorney for the government intends to use in evidence. The reasons for permitting the defendant to discover his own statements seem obviously to apply to the substance of any oral statement which the government intends to use in evidence at the trial. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(ii) (Approved Draft, 1970). Certainly disclosure will facilitate the raising of objections to admissibility prior to trial. There have been several conflicting decisions under the current rules as to whether the government must disclose the substance of oral statements of the defendant which it has in its possession. Cf. *United States* v. *Baker*, 262 F.Supp. 657 (D.C.D.C.1966); *United States* v. *Curry*, 278 F.Supp. 508 (N.D.Ill.1967); *United States* v. *Morrison*, 43 F.R.D. 516 (N.D.Ill.1967); *United States* v. *Reid*, 43 F.R.D. 520 (N.D.Ill.1967); *United States* v. *Armantrout*, 278 F.Supp. 517 (S.D.N.Y. 1968); and *United States* v. *Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967). There is, however, considerable support for the policy of disclosing the substance of the defendant's oral statement. Many courts have indicated that this is a "better practice" than denying such disclosure. E.g., *United States* v. *Curry*, supra; *Loux* v. *United States*, 389 F.2d 911 (9th Cir. 1968); and *United States* v. *Baker*, supra.

Subdivision (a)(1)(A) also provides for mandatory disclosure of any "recorded testimony" which defendant gives before a grand jury if the testimony "relates to the offense charged." The present rule is discretionary and is applicable only to those of defendant's statements which are "relevant."

The traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when the accused seeks discovery of his own testimony. Cf. *Dennis* v. *United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966); and *Allen* v. *United States*, 129 U.S.App.D.C. 61, 390 F.2d 476 (1968). In interpreting the rule many judges have granted defendant discovery without a showing of need or relevance. *United States* v. *Gleason*, 259 F.Supp. 282 (S.D.N.Y. 1966); *United States* v. *Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); and *United States* v. *United Concrete Pipe Corp.*, 41 F.R.D. 538 (N.D.Tex. 1966). Making disclosure mandatory without a showing of relevance conforms to the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iii) and Commentary pp. 64–66 (Approved Draft, 1970). Also see Note, Discovery by a Criminal Defendant of His Own Grand-Jury Testimony, 68 Columbia L.Rev. 311 (1968).

In a situation involving a corporate defendant, statements made by present and former officers and employees relating to their employment have been held discoverable as statements of the defendant. *United States* v. *Hughes*, 413 F.2d 1244 (5th Cir. 1969). The rule makes clear that such statements are discoverable if the officer or employee was "able legally to bind the defendant in respect to the activities involved in the charges."

Subdivision (a)(1)(B) allows discovery of the defendant's prior criminal record. A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficient and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.

Subdivision (a)(1)(C) gives a right of discovery of certain tangible objects under the specified circumstances. Courts have construed the old rule as making disclosure discretionary with the judge. Cf. *United States* v. *Kaminsky*, 275 F.Supp. 365 (S.D.N.Y. 1967); *Gevinson* v. *United States*, 358 F.2d 761 (5th Cir. 1966), cert. denied, 385 U.S. 823, 87 S.Ct. 51, 17 L.Ed.2d 60 (1966); and *United States* v. *Tanner*, 279 F.Supp. 457 (N.D.Ill. 1967). The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the document or tangible object was obtained from or belongs to the defendant.

Disclosure of documents and tangible objects which are "material" to the preparation of the defense may be required under the rule of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), without an additional showing that the request is "reasonable." In *Brady* the court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) and Commentary pp. 68–69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal § 254 especially n. 70 at p. 513 (1969, Supp. 1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal § 254 at p. 510 especially n. 58 (1969, Supp. 1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(iv) and Commentary pp. 66–68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to test expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandated under the rule of *Brady* v. *Maryland*, supra.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of these witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, e.g., Alaska R.Crim.Proc. 7(c); Ariz.R.Crim.Proc. 153, 17 A.R.S. (1956); Ark.Stat.Ann. § 43–1001 (1947); Cal.Pen.Code § 995n (West 1957); Colo. Rev.Stat.Ann. §§ 39–3–6, 39–4–2 (1963); Fla.Stat.Ann. § 906.29 (1944); Idaho Code Ann. § 19–1404 (1948); Ill. Rev.Stat. ch. 38, § 114–9 (1970); Ind.Ann.Stat. § 9–903 (1956), IC 1971, 35–1–16–3; Iowa Code Ann. § 772.3 (1950); Kan.Stat.Ann. § 62–931 (1964); Ky.R.Crim. Proc. 6.08 (1962); Mich.Stat.Ann. § 28.980, M.C.L.A. § 767.40 (Supp. 1971); Minn.Stat.Ann. § 628.08 (1947); Mo.Ann. Stat. § 545.070 (1953); Mont.Rev. Codes Ann. § 95–1503 (Supp. 1969); Neb.Rev.Stat. § 29–1602 (1964); Nev.Rev. Stat. § 173.045 (1967); Okl.Stat. tit. 22, § 384 (1951); Ore.Rev.Stat. § 132.580 (1969); Tenn. Code Ann. § 40–1708 (1955); Utah Code Ann. § 77–20–3 (1953). For examples of the ways in which these requirements are implemented, see *State* v. *Mitchell*, 181 Kan. 193, 310 P.2d 1063 (1957); *State* v. *Parr*, 129 Mont. 175, 283 P.2d 1086 (1955); *Phillips* v. *State*, 157 Neb. 419, 59 N.W. 598 (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial: 18 U.S.C. § 3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal cases, 44 F.R.D. 481, 499–500 (1968); Ratnoff, The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?, 19 Case Western Reserve L.Rev. 279, 284 (1968). See, e.g., *United States* v. *Estep*, 151 F.Supp. 668, 672–673 (N.D. Tex. 1957):

> Ninety percent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter.

See also the dissenting opinion of Mr. Justice Clark in *Roviaro* v. *United States*, 353 U.S. 53, 66–67, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. *Bergen Drug Co.* v. *Parke, Davis & Company*, 307 F.2d 725 (3d Cir. 1962); and *House of Materials, Inc.* v. *Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Dis-

covery and Procedure Before Trial § 2.5(b) (Approved Draft, 1970). It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not disclose "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case" or "statements made by government witnesses or prospective government witnesses." The only proposed change is that the "reports, memoranda, or other internal government documents made by the attorney for the government" are included to make clear that the work product of the government attorney is protected. See C. Wright, Federal Practice and Procedure: Criminal § 254 n. 92 (1969, Supp. 1971); *United States* v. *Rothman*, 179 F.Supp. 935 (W.D.Pa. 1959); Note, "Work Product" in Criminal Discovery, 1966 Wash. U.L.Q. 321; American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 2.6(a) (Approved Draft, 1970); cf. *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, not changed by this rule.

Subdivision (a)(3) is included to make clear that recorded proceedings of a grand jury are explicitly dealt with in rule 6 and subdivision (a)(1)(A) of rule 16 and thus are not covered by other provisions such as subdivision (a)(1)(C) which deals generally with discovery of documents in the possession, custody, or control of the government.

Subdivision (a)(4) is designed to insure that the government will not be penalized if it makes a full disclosure of all potential witnesses and then decides not to call one or more of the witnesses listed. This is not, however, intended to abrogate the defendant's right to comment generally upon the government's failure to call witnesses in an appropriate case.

Subdivision (b) deals with the government's right to discovery of defense evidence or, put in other terms, with the extent to which a defendant is required to disclose its evidence to the prosecution prior to trial. Subdivision (b) replaces old subdivision (c).

Subdivision (b) enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial in his case in chief, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Although the government normally has resources adequate to secure much of the evidence for trial, there are situations in which pretrial disclosure of evidence to the government is in the interest of effective and fair criminal justice administration. For example, the experimental "omnibus hearing" procedure (see discussion in Advisory Committee Note to rule 12) is based upon an assumption that the defendant, as well as the government, will be willing to disclose evidence prior to trial.

Having reached the conclusion that it is desirable to require broader disclosure by the defendant under certain circumstances, the Advisory Committee has taken the view that it is preferable to give the right of discovery to the government independently of a prior request for discovery by the defendant. This is the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial, Commentary, pp. 43–46 (Approved Draft, 1970). It is sometimes asserted that making the government's right to discovery conditional will minimize the risk that government discovery will be viewed as an infringement of the defendant's constitutional rights. See discussion in C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971); Moore, Criminal Discovery, 19 Hastings L.J. 865 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am.Cr.L.Q. 3 (1967). There are assertions that prosecution discovery, even if conditioned upon the defendants being granted discovery, is a violation of the privilege. See statements of Mr. Justice Black and Mr. Justice Douglas, 39 F.R.D. 69, 272, 277–278 (1966); C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971). Several states require defense disclosure of an intended defense of alibi and, in some cases, a list of witnesses in support of an alibi defense, without making the requirement conditional upon prior discovery being given to the defense. E.g., Ariz.R.Crim.P. 162(B), 17 A.R.S. (1956); Ind.Ann.Stat. § 9–1631 to 9–1633 (1956), IC 1971, 35–5–1–1 to 35–5–1–3; Mich.Comp.Laws Ann. §§ 768.20, 768.21 (1968); N.Y. CPL § 250.20 (McKinney's Consol.Laws, c. 11–A, 1971); and Ohio Rev.Code Ann. § 2945.58 (1954). State courts have refused to hold these statutes violative of the privilege against self-incrimination. See *State* v. *Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931), and *People* v. *Rakiec*, 260 App.Div. 452, 23 N.Y.S.2d 607, aff'd, 289 N.Y. 306, 45 N.E.2d 812 (1942). See also rule 12.1 and Advisory Committee Note thereto.

Some state courts have held that a defendant may be required to disclose, in advance of trial, evidence which he intends to use on his own behalf at trial without violating the privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *People* v. *Lopez*, 60 Cal.2d 223, 32 Cal.Rptr. 424, 384 P.2d 16 (1963); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif.L.Rev. 135 (1963); Note, 76 Harv. L.Rev. 838 (1963). The courts in *Jones* v. *Superior Court of Nevada County*, supra, suggests that if mandatory disclosure applies only to those items which the accused intends to introduce in evidence at trial, neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present.

On balance the Advisory Committee is of the view that an independent right of discovery for both the defendant

and the government is likely to contribute to both effective and fair administration. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif.L.Rev. 89 (1965), for an analysis of the difficulty of weighing the value of broad discovery against the value which inheres in not requiring the defendant to disclose anything which might work to his disadvantage.

Subdivision (b)(1)(A) provides that the defendant shall disclose any documents and tangible objects which he has in his possession, custody, or control and which he intends to introduce in evidence in his case in chief.

Subdivision (b)(1)(B) provides that the defendant shall disclose the results of physical or mental examinations and scientific tests or experiments if (a) they were made in connection with a particular case; (b) the defendant has them under his control; and (c) he intends to offer them in evidence in his case in chief or which were prepared by a defense witness and the results or reports relate to the witness's testimony. In cases where both prosecution and defense have employed experts to conduct tests such as psychiatric examinations, it seems as important for the government to be able to study the results reached by defense experts which are to be called by the defendant as it does for the defendant to study those of government experts. See Schultz, Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future, 22 N.Y.U.Intra.L.Rev. 268 (1967); American Bar Association, Standards Relating to Discovery and Procedure Before Trial § 3.2 (Supp., Approved Draft, 1970).

Subdivision (b)(1)(C) provides for discovery of a list of witnesses the defendant intends to call in his case in chief. State cases have indicated that disclosure of a list of defense witnesses does not violate the defendant's privilege against self-incrimination. See *Jones* v. *Superior Court of Nevada County*, supra, and *People* v. *Lopez*, supra. The defendant has the same option as does the government if it is believed that disclosure of the identity of a witness may subject that witness to harm or a threat of harm. The defendant can ask for a protective order under subdivision (d)(1) or can take a deposition in accordance with the terms of rule 15.

Subdivision (b)(2) is unchanged, appearing as the last sentence of subdivision (c) of old rule 16.

Subdivision (b)(3) provides that the defendant's failure to introduce evidence or call witnesses shall not be admissible in evidence against him. In states which require pretrial disclosure of witnesses' identity, the prosecution is not allowed to comment upon the defendant's failure to call a listed witness. See *O'Connor* v. *State*, 31 Wis.2d 684, 143 N.W.2d 489 (1966); *People* v. *Mancini*, 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (1959); and *State* v. *Cocco*, 73 Ohio App. 182, 55 N.E.2d 430 (1943). This is not, however, intended to abrogate the government's right to comment generally upon the defendant's failure to call witnesses in an appropriate case, other than the defendant's failure to testify.

Subdivision (c) is a restatement of part of old rule 16(g).

Subdivision (d)(1) deals with the protective order. Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed. See *Will* v. *United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967). The language "by the judge alone" is not meant to be inconsistent with *Alderman* v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). In *Alderman* the court points out that there may be appropriate occasions for the trial judge to decide questions relating to pretrial disclosure. See *Alderman* v. *United States*, 394 U.S. at 182 n. 14, 89 S.Ct. 961.

Subdivision (d)(2) is a restatement of part of old rule 16(g) and (d).

Old subdivision (f) of rule 16 dealing with time of motions is dropped because rule 12(c) provides the judge with authority to set the time for the making of pretrial motions including requests for discovery. Rule 12 also prescribes the consequences which follow from a failure to make a pretrial motion at the time fixed by the court. See rule 12(f).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 16 of the Federal Rules of Criminal Procedure regulates discovery by the defendant of evidence in possession of the prosecution, and discovery by the prosecution of evidence in possession of the defendant. The present rule permits the defendant to move the court to discover certain material. The prosecutor's discovery is limited and is reciprocal—that is, if the defendant is granted discovery of certain items, then the prosecution may move for discovery of similar items under the defendant's control.

As proposed to be amended, the rule provides that the parties themselves will accomplish discovery—no motion need be filed and no court order is necessary. The court will intervene only to resolve a dispute as to whether something is discoverable or to issue a protective order.

The proposed rule enlarges the scope of the defendant's discovery to include a copy of his prior criminal record and a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intends to call during its case-in-chief. It also permits the defendant to discover the substance of any oral statement of his which the prosecution intends to offer at trial, if the statement was given in response to interrogation by any person known by defendant to be a government agent.

Proposed subdivision (a)(2) provides that Rule 16 does not authorize the defendant to discover "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. ..."

The proposed rule also enlarges the scope of the government's discovery of materials in the custody of the defendant. The government is entitled to a list of the names and addresses of the witnesses the defendant intends to call during his case-in-chief. Proposed subdivision (b)(2) protects the defendant from having to disclose "reports, memoranda, or other internal defense documents ... made in connection with the investigation or defense of the case. ..."

Subdivision (d)(1) of the proposed rule permits the court to deny, restrict, or defer discovery by either party, or to

make such other order as is appropriate. Upon request, a party may make a showing that such an order is necessary. This showing shall be made to the judge alone if the party so requests. If the court enters an order after such a showing, it must seal the record of the showing and preserve it in the event there is an appeal.

B. Committee Action. The Committee agrees that the parties should, to the maximum possible extent, accomplish discovery themselves. The court should become involved only when it is necessary to resolve a dispute or to issue an order pursuant to subdivision (d).

Perhaps the most controversial amendments to this rule were those dealing with witness lists. Under present law, the government must turn over a witness list *only* in capital cases. [Section 3432 of title 18 of the United States Code provides: A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.] The defendant never needs to turn over a list of his witnesses. The proposed rule requires both the government and the defendant to turn over witness lists in every case, capital or noncapital. Moreover, the lists must be furnished to the adversary party upon that party's request.

The proposed rule was sharply criticized by both prosecutors and defenders. The prosecutors feared that pretrial disclosure of prosecution witnesses would result in harm to witnesses. The defenders argued that a defendant cannot constitutionally be compelled to disclose his witnesses.

The Committee believes that it is desirable to promote greater pretrial discovery. As stated in the Advisory Committee Note,

> broader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence. . . .

The Committee, therefore, endorses the principle that witness lists are discoverable. However, the Committee has attempted to strike a balance between the narrow provisions of existing law and the broad provisions of the proposed rule.

The Committee rule makes the procedures defendant-triggered. If the defendant asks for and receives a list of prosecution witnesses, then the prosecution may request a list of defense witnesses. The witness lists need not be turned over until 3 days before trial. The court can modify the terms of discovery upon a sufficient showing. Thus, the court can require disclosure of the witness lists earlier than 3 days before trial, or can permit a party not to disclose the identity of a witness before trial.

The Committee provision promotes broader discovery and its attendant values—informed disposition of cases without trial, minimizing the undesirable effect of surprise, and helping insure that the issue of guilt or innocence is accurately determined. At the same time, it avoids the problems suggested by both the prosecutors and the defenders.

The major argument advanced by prosecutors is the risk of danger to their witnesses if their identities are disclosed prior to trial. The Committee recognizes that there may be a risk but believes that the risk is not as great as some fear that it is. Numerous states require the prosecutor to provide the defendant with a list of prosecution witnesses prior to trial. [These States include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Tennessee, and Utah. See Advisory Committee Note, House Document 93-292, at 60.] The evidence before the Committee indicates that these states have not experienced unusual problems of witness intimidation. [See the comments of the Standing Committee on Criminal Law and Procedure of the State Bar of California in Hearings II, at 302.]

Some federal jurisdictions have adopted an omnibus pretrial discovery procedure that calls upon the prosecutor to give the defendant its witness lists. One such jurisdiction is the Southern District of California. The evidence before the Committee indicates that there has been no unusual problems with witness intimidation in that district. Charles Sevilla, Chief Trial Attorney for the Federal Defenders of San Diego, Inc., which operates in the Southern District of California, testified as follows:

> The Government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive Government witness lists as a matter of course in the Southern District, and it's a rare occasion when there is any overture by a defense witness or by a defendant to a Government witness. It simply doesn't happen except on the rarest of occasion. When the Government has that fear it can resort to the protective order. [Hearings II, at 42.]

Mr. Sevilla's observations are corroborated by the views of the U.S. Attorney for the Southern District of California:

> Concerning the modifications to Rule 16, we have followed these procedures informally in this district for a number of years. We were one of the districts selected for the pilot projects of the Omnibus Hearing in 1967 or 1968. We have found that the courts in our district will not require us to disclose names of proposed witnesses when in our judgment to do so would not be advisable. Otherwise we routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untoward results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant. [Hearings I, at 109.]

Much of the prosecutorial criticism of requiring the prosecution to give a list of its witnesses to the defendant reflects an unwillingness to trust judges to exercise sound judgment in the public interest. Prosecutors have stated that they frequently will open their files to defendants in order to induce pleas. [See testimony of Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania, in Hearings I, at 150.]

Prosecutors are willing to determine on their own when they can do this without jeopardizing the safety of witnesses. There is no reason why a judicial officer cannot exercise the same discretion in the public interest.

The Committee is convinced that in the usual case there is no serious risk of danger to prosecution witnesses from pretrial disclosure of their identities. In exceptional instances, there may be a risk of danger. The Committee rule, however, is capable of dealing with those exceptional instances while still providing for disclosure of witnesses in the usual case.

The Committee recognizes the force of the constitutional arguments advanced by defenders. Requiring a defendant, upon request, to give to the prosecution material which may be incriminating, certainly raises very serious constitutional problems. The Committee deals with these problems by having the defendant trigger the discovery procedures. Since the defendant has no constitutional right to discover any of the prosecution's evidence (unless it is exculpatory within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963)), it is permissible to condition his access to nonexculpatory evidence upon his turning over a list of defense witnesses. Rule 16 currently operates in this manner.

The Committee also changed subdivisions (a)(2) and (b)(2), which set forth "work product" exceptions to the general discovery requirements. The subsections proposed by the Supreme Court are cast in terms of the type of document involved (e.g., report), rather than in terms of the content (e.g., legal theory). The Committee recast these provisions by adopting language from Rule 26(b)(3) of the Federal Rules of Civil Procedure.

The Committee notes that subdivision (a)(1)(C) permits the defendant to discover certain items that "were obtained from or belong to the defendant." The Committee believes that, as indicated in the Advisory Committee Note [House Document 93–292, at 59], items that "were obtained from or belong to the defendant" are items that are material to the preparation of his defense.

The Committee added language to subdivision (a)(1)(B) to conform it to provisions in subdivision (a)(1)(A). The rule as changed by the Committee requires the prosecutor to give the defendant such copy of the defendant's prior criminal record as is within the prosecutor's "possession, custody, or control, the existence of which is known, or by the exercise of due diligence may become known" to the prosecutor. The Committee also made a similar conforming change in subdivision (a)(1)(E), dealing with the criminal records of government witnesses. The prosecutor can ordinarily discharge his obligation under these two subdivisions, (a)(1)(B) and (E), by obtaining a copy of the F.B.I. "rap sheet."

The Committee made an additional change in subdivision (a)(1)(E). The proposed rule required the prosecutor to provide the defendant with a record of the felony convictions of government witnesses. The major purpose for letting the defendant discover information about the record of government witnesses, is to provide him with information concerning the credibility of those witnesses. Rule 609(a) of the Federal Rules of Evidence permits a party to attack the credibility of a witness with convictions other than just felony convictions. The Committee, therefore, changed subdivision (a)(1)(E) to require the prosecutor to turn over a record of all criminal convictions, not just felony convictions.

The Committee changed subdivision (d)(1), which deals with protective orders. Proposed (d)(1) required the court to conduct an ex parte proceeding whenever a party so requested. The Committee changed the mandatory language to permissive language. A Court may, not must, conduct an ex parte proceeding if a party so requests. Thus, if a party requests a protective or modifying order and asks to make its showing ex parte, the court has two separate determinations to make. First, it must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged. [An ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identity of a witness would be disclosed and the purpose of the protective order is to conceal that witness' identity.] Second, it must determine whether a protective or modifying order shall issue.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94–414

Rule 16 deals with pretrial discovery by the defendant and the government. The House and Senate versions of the bill differ on Rule 16 in several respects.

A. Reciprocal vs. Independent Discovery for the Government.—The House version of the bill provides that the government's discovery is reciprocal. If the defendant requires and receives certain items from the government, then the government is entitled to get similar items from the defendant. The Senate version of the bill gives the government an independent right to discover material in the possession of the defendant.

The Conference adopts the House provisions.

B. Rule 16(a)(1)(A).—The House version permits an organization to discover relevant recorded grand jury testimony of any witness who was, at the time of the acts charged or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind it in respect to the activities involved in the charges. The Senate version limits discovery of this material to testimony of a witness who was, at the time of the grand jury proceeding, so situated as an officer or employee as to have been legally to bind the defendant in respect to the activities involved in the charges.

The Conferees share a concern that during investigations, ex-employees and ex-officers of potential corporate defendants are a critical source of information regarding activities of their former corporate employers. It is not unusual that, at the time of their testimony or interview, these persons may have interests which are substantially adverse to or divergent from the putative corporate defendant. It is also not unusual that such individuals, though no longer sharing a community of interest with the corporation, may nevertheless be subject to pressure from their former employers. Such pressure may derive from the fact that the ex-employees or ex-officers have remained in the same industry or related industry, are employed by competitors, suppliers, or customers of their former employers, or have pension or other deferred compensation arrangements with former employers.

The Conferees also recognize that considerations of fairness require that a defendant corporation or other

legal entity be entitled to the grand jury testimony of a former officer or employee if that person was personally involved in the conduct constituting the offense and was able legally to bind the defendant in respect to the conduct in which he was involved.

The Conferees decided that, on balance, a defendant organization should not be entitled to the relevant grand jury testimony of a former officer or employee in every instance. However, a defendant organization should be entitled to it if the former officer or employee was personally involved in the alleged conduct constituting the offense and was so situated as to have been able legally to bind the defendant in respect to the alleged conduct. The Conferees note that, even in those situations where the rule provides for disclosure of the testimony, the Government may, upon a sufficient showing, obtain a protective or modifying order pursuant to Rule 16(d)(1).

The Conference adopts a provision that permits a defendant organization to discover relevant grand jury testimony of a witness who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

C. Rules 16(a)(1)(E) and (b)(1)(C) (witness lists).—The House version of the bill provides that each party, the government and the defendant, may discover the names and addresses of the other party's witnesses 3 days before trial. The Senate version of the bill eliminates these provisions, thereby making the names and addresses of a party's witnesses nondiscoverable. The Senate version also makes a conforming change in Rule 16(d)(1). The Conference adopts the Senate version.

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

D. Rules 16(a)(2) and (b)(2).—Rules 16(a)(2) and (b)(2) define certain types of materials ("work product") not to be discoverable. The House version defines work product to be "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents." This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be "reports, memoranda, or other internal government documents." This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is labelled "report", "memorandum", or "internal document". For example if a document qualifies as a statement of the defendant within the meaning of the Rule 16(a)(1)(A), then the labelling of that document as "report", "memorandum", or "internal government document" will not shield that statement from discovery. Likewise, if the results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled "report", "memorandum", or "internal defense document".

1983 AMENDMENT

Rule 16(a)(3)

The added language is made necessary by the addition of Rule 26.2 and new subdivision (i) of Rule 12, which contemplate the production of statements, including those made to a grand jury, under specified circumstances.

Rule 17. Subpoena

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.

(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of

age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

(e) Place of Service.

(1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) Abroad. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

(f) For Taking Deposition; Place of Examination.

(1) Issuance. An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) Place. The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

(h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94–64, § 3(29), 89 Stat. 375, Apr. 30, 1979, eff. Dec. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is substantially the same as Rule 45(a) of the Federal Rules of Civil Procedure, 28 U.S.C. Appendix.

Note to Subdivision (b). This rule preserves the existing right of an indigent defendant to secure attendance of witnesses at the expense of the Government, 28 U.S.C. former § 656 (Witnesses for indigent defendants). Under existing law, however, the right is limited to witnesses who are within the district in which the court is held or within one hundred miles of the place of trial. No procedure now exists whereby an indigent defendant can procure at Government expense the attendance of witnesses found in another district and more than 100 miles of the place of trial. This limitation is abrogated by the rule so that an indigent defendant will be able to secure the attendance of witnesses at the expense of the Government no matter where they are located. The showing required by the rule to justify such relief is the same as that now exacted by 28 U.S.C. former § 656.

Note to Subdivision (c). This rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (d). This rule is substantially the same as Rule 45(c) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. The provision permitting persons other than the marshal to serve the subpoena, and requiring the payment of witness fees in Government cases is new matter.

Note to Subdivision (e). (1) This rule continues existing law, 28 U.S.C. § 654 (Witnesses; subpoenas; may run into another district). The rule is different in civil cases in that in such cases, unless a statute otherwise provides, a subpoena may be served only within the district or within 100 miles of the place of trial, 28 U.S.C. former § 654; Rule 45(e)(1) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

(2) This rule is substantially the same as Rule 45(e)(2) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. See *Blackmer* v. *United States*, 284 U.S. 421, upholding the validity of the statute referred to in the rule.

Note to Subdivision (f). This rule is substantially the same as Rule 45(d) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (g). This rule is substantially the same as Rule 45(f) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

1948 AMENDMENT

The amendment is to substitute proper reference to Title 28 in place of the repealed act.

1966 AMENDMENT

Subdivision (b).—Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. Id. at 40–41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. *Smith* v. *United States*, 312 F.2d 867 (D.C. Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. *Greenwell* v. *United States*, 317 F.2d 108 (D.C. Cir. 1963).

The amendment makes several changes. The references to a judge are deleted since applications should be made to the court. An ex parte application followed by a

satisfactory showing is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Subdivision (d).—The subdivision is revised to bring it into conformity with 28 U.S.C. § 1825.

1972 AMENDMENT

Subdivisions (a) and (g) are amended to reflect the existence of the "United States magistrate," a phrase defined in rule 54.

1974 AMENDMENT

Subdivision (f)(2) is amended to provide that the court has discretion over the place at which the deposition is to be taken. Similar authority is conferred by Civil Rule 45(d)(2). See C. Wright, Federal Practice and Procedure: Criminal § 278 (1969).

Ordinarily the deposition should be taken at the place most convenient for the witness but, under certain circumstances, the parties may prefer to arrange for the presence of the witness at a place more convenient to counsel.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 17 of the Federal Rules of Criminal Procedure deals with subpoenas. Subdivision (f)(2) as proposed by the Supreme Court provides:

> The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court.

B. Committee Action. The Committee added language to the proposed amendment that directs the court to consider the convenience of the witness and the parties when compelling a witness to attend where a deposition will be taken.

1979 AMENDMENT

This addition to rule 17 is necessary in light of proposed rule 26.2, which deals with the obtaining of statements of government and defense witnesses.

Rule 17.1. Pretrial Conference

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This new rule establishes a basis for pretrial conferences with counsel for the parties in criminal cases within the discretion of the court. Pretrial conferences are now being utilized to some extent even in the absence of a rule. See, generally, Brewster, Criminal Pre-Trials—Useful Techniques, 29 F.R.D. 442 (1962); Estes, Pre-Trial Conferences in Criminal Cases, 23 F.R.D. 560 (1959); Kaufman, Pre-Trial in Criminal Cases, 23 F.R.D. 551 (1959); Kaufman, Pre-Trial in Criminal Cases, 42 J.Am. Jud.Soc. 150 (1959); Kaufman, The Appalachian Trial: Further Observations on Pre-Trial in Criminal Cases, 44 J.Am.Jud.Soc. 53 (1960); West, Criminal Pre-Trials—Useful Techniques, 29 F.R.D. 436 (1962); Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 399–403, 468–470 (1960). Cf. Mo. Sup. Ct. Rule 25.09; Rules Governing the N.J. Courts, § 3:5–3.

The rule is cast in broad language so as to accommodate all types of pretrial conferences. As the third sentence suggests, in some cases it may be desirable or necessary to have the defendant present. See Committee on Pretrial Procedure of the Judicial Conference of the United States, Recommended Procedures in Criminal Pretrials, 37 F.R.D. 95 (1965).

V. VENUE

Rule 18. Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. The Constitution of the United States, Article III. Section 2, Paragraph 3, provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *

28 U.S.C. former § 114 (now §§ 1393, 1441) provides:

All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district.

The word "prosecutions," as used in this statute, does not include the finding and return of an indictment. The prevailing practice of impaneling a grand jury for the entire district at a session in some division and of distributing the indictments among the divisions in which the offenses were committed is deemed proper and legal, *Salinger* v. *Loisel*, 265 U.S. 224, 237, 44 S.Ct. 519, 68 L.Ed. 989. The court stated that this practice is "attended with real advantages." The rule is a restatement of existing law and is intended to sanction the continuance of this practice. For this reason, the rule requires that only the trial be held in the division in which the offense was committed and permits other proceedings to be had elsewhere in the same district.

2. Within the framework of the foregoing constitutional provisions and the provisions of the general statute, 28 U.S.C. former § 114 (now §§ 1393, 1441), supra, numerous statutes have been enacted to regulate the venue of criminal proceedings, particularly in respect to continuing offenses and offenses consisting of several transactions occurring in different districts. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 73–77, 28 S.Ct. 428, 52 L.Ed. 681; *United States* v. *Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236. These special venue provisions are not affected by the rule. Among these statutes are the following:

U.S.C. Title 8 former:

§ 138 [now §§ 1326, 1328, 1329] (Importation of aliens for immoral purposes; attempt to reenter after deportation; penalty)

U.S.C. Title 15:

§ 78aa (Regulation of Securities Exchanges; jurisdiction of offenses and suits)

§ 79y (Control of Public Utility Holding Companies; jurisdiction of offenses and suits)

§ 80a–43 (Investment Companies; jurisdiction of offenses and suits)

§ 80b–14 (Investment Advisers; jurisdiction of offenses and suits)

§ 298 (Falsely Stamped Gold or Silver, etc., violations of law; penalty; jurisdiction of prosecutions)

§ 715i (Interstate Transportation of Petroleum Products; restraining violations; civil and criminal proceedings; jurisdiction of District Courts; review)

§ 717u (Natural Gas Act; jurisdiction of offenses; enforcement of liabilities and duties)

U.S.C. Title 18 former:

§ 39 [now §§ 5, 3241] (Enforcement of neutrality; United States defined; jurisdiction of offenses; prior offenses; partial invalidity of provisions)

§ 336 [now § 1302] (Lottery, or gift enterprise circulars not mailable; place of trial)

§ 338a [now §§ 876, 3239] (Mailing threatening communications)

§ 338b [now §§ 877, 3239] (Same; mailing in foreign country for delivery in the United States)

§ 345 [now § 1717] (Using or attempting to use mails for transmission of matter declared nonmailable by title; jurisdiction of offense)

§ 396e [now § 1762] (Transportation or importation of convict-made goods with intent to use in violation of local law; jurisdiction of violations)

§ 401 [now § 2421] (White slave traffic; jurisdiction of prosecutions)

§ 408 [now §§ 10, 2311 to 2313] (Motor vehicles; transportation, etc., of stolen vehicles)

§ 408d [now §§ 875, 3239] (Threatening communications in interstate commerce)

§ 408e [now § 1073] (Moving in interstate or foreign commerce to avoid prosecution for felony or giving testimony)

§ 409 [now §§ 659, 660, 2117] (Larceny, etc., of goods in interstate or foreign commerce; penalty)

§ 412 [now § 660] (Embezzlement, etc., by officers of carrier; jurisdiction; double jeopardy)

§ 418 [now § 3237] (National Stolen Property Act; jurisdiction)

§ 419d [now § 3237] (Transportation of stolen cattle in interstate or foreign commerce; jurisdiction of offense)

§ 420d [now § 1951] (Interference with trade and commerce by violence, threats, etc., jurisdiction of offenses)

§ 494 [now § 1654] (Arming vessel to cruise against citizen; trials)

§ 553 [now § 3236] (Place of committal of murder or manslaughter determined)

U.S.C. Title 21:

§ 17 (Introduction into, or sale in, State or Territory or District of Columbia of dairy or food products falsely labeled or branded; penalty; jurisdiction of prosecutions)

§ 118 (Prevention of introduction and spread of contagion; duty of district attorneys)

U.S.C. Title 28 former:

§ 101 [now 18 U.S.C. § 3235] (Capital cases)

§ 102 [now 18 U.S.C. § 3238] (Offenses on the high seas)

§ 103 [now 18 U.S.C. § 3237] (Offenses begun in one district and completed in another)

§ 121 [now 18 U.S.C. § 3240] (Creation of new district or division)

U.S.C. Title 47:

§ 33 (Submarine Cables; jurisdiction and venue of actions and offenses)

§ 505 (Special Provisions Relating to Radio; venue of trials)

U.S.C. Title 49:

§ 41 (Legislation Supplementary to Interstate Commerce Act; liability of corporation carriers and agents; offenses and penalties—(1) Liability of corporation common carriers; offenses; penalties; Jurisdiction)

§ 623 [now § 1473] (Civil Aeronautics Act; venue and prosecution of offenses)

1966 AMENDMENT

The amendment eliminates the requirement that the prosecution shall be in a division in which the offense was committed and vests discretion in the court to fix the

place of trial at any place within the district with due regard to the convenience of the defendant and his witnesses.

The Sixth Amendment provides that the defendant shall have the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. * * *" There is no constitutional right to trial within a division. See *United States* v. *Anderson*, 328 U.S. 699, 704, 705 (1946); *Barrett* v. *United States*, 169 U.S. 218 (1898); *Lafoon* v. *United States*, 250 F.2d 958 (5th Cir. 1958); *Carrillo* v. *Squier*, 137 F.2d 648 (9th Cir. 1943); *McNealey* v. *Johnston*, 100 F.2d 280, 282 (9th Cir. 1938). Cf. *Platt* v. *Minnesota Mining and Manufacturing Co.*, 376 U.S. 240 (1964).

The former requirement for venue within the division operated in an irrational fashion. Divisions have been created in only half of the districts, and the differentiation between those districts with and those without divisions often bears no relationship to comparative size or population. In many districts a single judge is required to sit in several divisions and only brief and infrequent terms may be held in particular divisions. As a consequence under the original rule there was often undue delay in the disposition of criminal cases—delay which was particularly serious with respect to defendants who had been unable to secure release on bail pending the holding of the next term of court.

If the court is satisfied that there exists in the place fixed for trial prejudice against the defendant so great as to render the trial unfair, the court may, of course, fix another place of trial within the district (if there be such) where such prejudice does not exist. Cf. Rule 21 dealing with transfers between districts.

1979 AMENDMENT

This amendment is intended to eliminate an inconsistency between rule 18, which in its present form has been interpreted not to allow trial in a division other than that in which the offense was committed except as dictated by the convenience of the defendant and witnesses, *Dupoint* v. *United States*, 388 F.2d 39 (5th Cir. 1968), and the Speedy Trial Act of 1974. This Act provides:

> In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

18 U.S.C. § 3161(a). This provision is intended to "permit the trial of a case at any place within the judicial district. This language was included in anticipation of problems which might occur in districts with statutory divisions, where it could be difficult to set trial outside the division." H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 29 (1974).

The change does not offend the venue or vicinage provisions of the Constitution. Article III, § 2, clause 3 places venue (the geographical location of the trial) "in the State where the said Crimes shall have been committed," while the Sixth Amendment defines the vicinage (the geographical location of the jurors) as "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The latter provision makes "no reference to a division within a judicial district." *United States* v. *James*, 528 F.2d 999 (5th Cir. 1976). "It follows *a fortiori* that when a district is not separated into divisions, * * trial at any place within the district is allowable under the Sixth Amendment * * *." *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973). See also *Zicarelli* v. *Gray*, 543 F.2d 466 (3d Cir. 1976) and cases cited therein.

Nor is the change inconsistent with the Declaration of Policy in the Jury Selection and Service Act of 1968, which reads:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

28 U.S.C. § 1861. This language does *not* mean that the Act requires "the trial court to convene not only in the district but also in the division wherein the offense occurred," as:

> There is no hint in the statutory history that the Jury Selection Act was intended to do more than provide improved judicial machinery so that grand and petit jurors would be selected at random by the use of objective qualification criteria to ensure a representative cross section of the district or division in which the grand or petit jury sits.

United States v. *Cates*, 485 F.2d 26 (1st Cir. 1974).

The amendment to rule 18 does not eliminate either of the existing considerations which bear upon fixing the place of trial within a district, but simply adds yet another consideration in the interest of ensuring compliance with the requirements of the Speedy Trial Act of 1974. The amendment does not authorize the fixing of the place of trial for yet other reasons. Cf. *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973) (court in the exercise of its supervisory power held improper the fixing of the place of trial "for no apparent reason other than the convenience of the judge").

Rule 19. Rescinded Feb. 28, 1966, eff. July 1, 1966

1966 Rescission

Prior to rescission this rule read: "In a District consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, if the defendant consents, in any division at any time".

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 19 is rescinded in view of the amendments being proposed to rule 18.

Rule 20. Transfer From the District for Plea and Sentence

(a) Indictment or Information Pending. A defendant arrested, held, or present in a district other than that in which an indictment or information is pending against him may state in writing that he

wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending, and to consent to disposition of the case in the district in which he was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is arrested, held, or present, and the prosecution shall continue in that district.

(b) Indictment or Information Not Pending. A defendant arrested, held, or present, in a district other than the district in which a complaint is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district in which he was arrested, held, or present, subject to the approval of the United States attorney for each district. Upon filing the written waiver of venue in the district in which the defendant is present, the prosecution may proceed as if venue were in such district.

(c) Effect of Not Guilty Plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him.

(d) Juveniles. A juvenile (as defined in 18 U.S.C. § 5031) who is arrested, held, or present in a district other than that in which he is alleged to have committed an act in violation of a law of the United States not punishable by death or life imprisonment may, after he has been advised by counsel and with the approval of the court and the United States attorney for each district, consent to be proceeded against as a juvenile delinquent in the district in which he is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of his rights, including the right to be returned to the district in which he is alleged to have committed the act, and of the consequences of such consent.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(30), 89 Stat. 375; Apr. 28, 1982, eff. Aug. 1, 1982.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule introduces a new procedure in the interest of defendants who intend to plead guilty and are arrested in a district other than that in which the prosecution has been instituted. This rule would accord to a defendant in such a situation an opportunity to secure a disposition of the case in the district where the arrest takes place, thereby relieving him of whatever hardship may be involved in a removal to the place where the prosecution is pending. In order to prevent possible interference with the administration of justice, however, the consent of the United States attorneys involved is required.

1966 AMENDMENT

Rule 20 has proved to be most useful. In some districts, however, literal compliance with the procedures spelled out by the rule has resulted in unnecessary delay in the disposition of cases. This delay has been particularly troublesome where the defendant has been arrested prior to the filing of an indictment or information against him. See e.g., the procedure described in *Donovan* v. *United States*, 205 F.2d 557 (10th Cir. 1953). Furthermore, the benefit of the rule has not been available to juveniles electing to be proceeded against under 18 U.S.C. §§ 5031–5037. In an attempt to clarify and simplify the procedure the rule has been recast into four subdivisions.

Subdivision (a).—This subdivision is intended to apply to the situation in which an indictment or information is pending at the time at which the defendant indicates his desire to have the transfer made. Two amendments are made to the present language of the rule. In the first sentence the words "or held" and "or is held" are added to make it clear that a person already in state or federal custody within a district may request a transfer of federal charges pending against him in another district. See 4 Barron, Federal Practice and Procedure 146 (1951). The words "after receiving a copy of the indictment or information" are deleted.

The defendant should be permitted, if he wishes, to initiate transfer proceedings under the Rule without waiting for a copy of the indictment or information to be obtained. The defendant is protected against prejudice by the fact that under subdivision (c) he can, in effect, rescind his action by pleading not guilty after the transfer has been completed.

Subdivision (b).—This subdivision is intended to apply to the situation in which no indictment or information is pending but the defendant has been arrested on a warrant issued upon a complaint in another district. Under the procedure set out he may initiate the transfer proceedings without waiting for the filing of an indictment or information in the district where the complaint is pending. Also it is made clear that the defendant may validate an information previously filed by waiving indictment in open court when he is brought before the court to plead. See *United States* v. *East*, 5 F.R.D. 389. (N.D. Ind. 1946); *Potter* v. *United States*, 36 F.R.D. 394 (W.D. Mo. 1965). Here again the defendant is fully protected by the fact that at the time of pleading in the transferee court he may then refuse to waive indictment and rescind the transfer by pleading not guilty.

Subdivision (c).—The last two sentences of the original rule are included here. The last sentence is amended to forbid use against the defendant of his statement that

he wishes to plead guilty or nolo contendere whether or not he was represented by counsel when it was made. Since under the amended rule the defendant may make his statement prior to receiving a copy of the indictment or information, it would be unfair to permit use of that statement against him.

Subdivision (d).—Under 18 U.S.C. § 5033 a juvenile who has committed an act in violation of the law of the United States in one district and is apprehended in another must be returned to the district "having cognizance of the alleged violation" before he can consent to being proceeded against as a juvenile delinquent. This subdivision will permit a juvenile after he has been advised by counsel and with the approval of the court and the United States attorney to consent to be proceeded against in the district in which he is arrested or held. Consent is required only of the United States attorney in the district of the arrest in order to permit expeditious handling of juvenile cases. If it is necessary to recognize special interests of particular districts where offenses are committed—e.g., the District of Columbia with its separate Juvenile Court (District of Columbia Code § 11–1551(a))—the Attorney General may do so through his Administrative control over United States Attorneys.

Subdivision (e).—This subdivision is added to make it clear that a defendant who appears in one district in response to a summons issued in the district where the offense was committed may initiate transfer proceedings under the rule.

1974 AMENDMENT

Rule 20 is amended to provide that a person "present" in a district other than the district in which he is charged with a criminal offense may, subject to the other provisions of rule 20, plead guilty in the district in which he is "present." See rule 6(b), Rules of Procedure for the Trial of Minor Offenses Before Magistrates.

Under the former rule, practice was to have the district in which the offense occurred issue a bench warrant authorizing the arrest of the defendant in the district in which he was located. This is a procedural complication which serves no interest of either the government or the defense and therefore can properly be dispensed with.

Making the fact that a defendant is "present" in the district an adequate basis for allowing him to plead guilty there makes it unnecessary to retain subdivision (e) which makes appearance in response to a summons equivalent to an arrest. Dropping (e) will eliminate some minor ambiguity created by that subdivision. See C. Wright, Federal Practice and Procedure: Criminal § 322 n. 26, p. 612 (1969, Supp. 1971).

There are practical advantages which will follow from the change. In practice a person may turn himself in in a district other than that in which the prosecution is pending. It may be more convenient to have him plead in the district in which he is present rather than having him or the government incur the expense of his return to the district in which the charge is pending.

The danger of "forum shopping" can be controlled by the requirement that both United States Attorneys agree to the handling of the case under provisions of this rule.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247

A. Amendments Proposed by the Supreme Court. Rule 20 of the Federal Rules of Criminal Procedure deals with transferring a defendant from one district to another for the purpose of pleading and being sentenced. It deals with the situation where a defendant is located in one district (A) and is charged with a crime in another district (B). Under the present rule, if such a defendant desires to waive trial and plead guilty or nolo contendere, a judge in district B would issue a bench warrant for the defendant, authorizing his arrest in district A and his transport to district B for the purpose of pleading and being sentenced.

The Supreme Court amendments permit the defendant in the above example to plead guilty or nolo contendere in district A, if the United States Attorneys for districts A and B consent.

B. Committee Action. The Committee has added a conforming amendment to subdivision (d), which establishes procedures for dealing with defendants who are juveniles.

1982 AMENDMENT

This amendment to subdivision (b) is intended to expedite transfer proceedings under Rule 20. At present, considerable delay—sometimes as long as three or four weeks—occurs in subdivision (b) cases, that is, where no indictment or information is pending. This time is spent on the transmittal of defendant's statement to the district where the complaint is pending, the filing of an information or return of an indictment there, and the transmittal of papers in the case from that district to the district where the defendant is present. Under the amendment, the defendant, by also waiving venue, would make it possible for charges to be filed in the district of his arrest or presence. This would advance the interests of both the prosecution and defendant in a timely entry of a plea of guilty. No change has been made in the requirement that the transfer occur with the consent of both United States attorneys.

Rule 21. Transfer from the District for Trial

(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

(c) Proceedings on Transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and

any bail taken, and the prosecution shall continue in that district.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivisions (a) and (b). 1. This rule introduces an addition to existing law. "Lawyers not thoroughly familiar with Federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems to be a defect in the federal law, which the proposed rules would cure." Homer Cummings, 29 A.B.A.Jour. 655; Medalie, 4 Lawyers Guild R. (3)1, 5.

2. The rule provides for two kinds of motions that may be made by the defendant for a change of venue. The first is a motion on the ground that so great a prejudice exists against the defendant that he cannot obtain a fair and impartial trial in the district or division where the case is pending. Express provisions to a similar effect are found in many State statutes. See, e.g., Ala. Code (1940), Title 15, sec. 267; Cal. Pen. Code (Deering, 1941), sec. 1033; Conn. Gen. Stat. (1930), sec. 6445; Mass. Gen. Laws (1932) c. 277, sec. 51 (in capital cases); N.Y. Code of Criminal Procedure, sec. 344. The second is a motion for a change of venue in cases involving an offense alleged to have been committed in more than one district or division. In such cases the court, on defendant's motion, will be authorized to transfer the case to another district or division in which the commission of the offense is charged, if the court is satisfied that it is in the interest of justice to do so. The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court.

3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed. Constitution of the United States, Article III, Sec. 2, Par. 3; Amendment VI. By making a motion for a change of venue, however, the defendant waives this constitutional right.

4. This rule is in addition to and does not supersede existing statutes enabling a party to secure a change of judge on the ground of personal bias or prejudice, 28 U.S.C. former § 25 (now § 144); or enabling the defendant to secure a change of venue as of right in certain cases involving offenses committed in more than one district, 18 U.S.C. former § 338a(d) (now §§ 876, 3239) (Mailing threatening communications); Id. 18 U.S.C. § 403d(d) (now §§ 875, 3239) (Threatening communications in interstate commerce).

Note to Subdivision (c). Cf. 28 U.S.C. former § 114 (now §§ 1393, 1441) and Rule 20, supra.

1966 AMENDMENT

Subdivision (a).—All references to divisions are eliminated in accordance with the amendment to Rule 18 eliminating division venue. The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18. It is also made clear that on a motion to transfer under this subdivision the court may select the district to which the transfer may be made. Cf. *United States* v. *Parr*, 17 F.R.D. 512, 519 (S.D. Tex. 1955); *Parr* v. *United States*, 351 U.S. 513 (1956).

Subdivision (b).—The original rule limited change of venue for reasons other than prejudice in the district to those cases where venue existed in more than one district. Upon occasion, however, convenience of the parties and witnesses and the interest of justice would best be served by trial in a district in which no part of the offense was committed. See, e.g., *Travis* v. *United States*, 364 U.S. 631 (1961), holding that the only venue of a charge of making or filing a false non-Communist affidavit required by § 9(h) of the National Labor Relations Act is in Washington, D.C. even though all the relevant witnesses may be located at the place where the affidavit was executed and mailed. See also Barber, Venue in Federal Criminal Cases: A Plea for Return to Principle, 42 Tex.L.Rev. 39 (1963); Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 329 (1964). The amendment permits a transfer in any case on motion of the defendant on a showing that it would be for the convenience of parties and witnesses, and in the interest of justice. Cf. 28 U.S.C. § 1404(a), stating a similar standard for civil cases. See also *Platt* v. *Minnesota Min. & Mfg. Co.*, 376 U.S.C. 240 (1964). Here, as in subdivision (a), the court may select the district to which the transfer is to be made. The amendment also makes it clear that the court may transfer all or part of the offenses charged in a multi-count indictment or information. Cf. *United States* v. *Choate*, 276 F.2d 724 (5th Cir. 1960). References to divisions are eliminated in accordance with the amendment to Rule 18.

Subdivision (c).—The reference to division is eliminated in accordance with the amendment to Rule 18.

Rule 22. Time of Motion to Transfer

A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

NOTES OF ADVISORY COMMITTEE ON RULES

Cf. Rule 12(b)(3).

VI. TRIAL

Rule 23. Trial by Jury or by the Court

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 26, 1976, eff. Oct. 1, 1977; Pub.L. 95–78, § 2(b), July 30, 1977, 91 Stat. 320; Apr. 28, 1983, eff. Aug. 1, 1983.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. This rule is a formulation of the constitutional guaranty of trial by jury, Constitution of the United States, Article III, Sec. 2, Par. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *"; Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." The right to a jury trial, however, does not apply to petty offenses, *District of Columbia* v. *Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843; *Schick* v. *United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99, 1 Ann.Cas. 585; Frankfurter and Corcoran, 39 Harv.L.R. 917. Cf. Rule 38(a) of the Federal Rules of Civil Procedure.

2. The provision for a waiver of jury trial by the defendant embodies existing practice, the constitutionality of which has been upheld, *Patton* v. *United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263; *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435; Cf. Rules 38 and 39 of Federal Rules of Civil Procedure, 28 U.S.C., Appendix. Many States by express statutory provision permit waiver of jury trial in criminal cases. See A.L.I. Code of Criminal Procedure Commentaries, pp. 807–811.

Note to Subdivision (b). This rule would permit either a stipulation before the trial that the case be tried by a jury composed of less than 12 or a stipulation during the trial consenting that the case be submitted to less than 12 jurors. The second alternative is useful in case it becomes necessary during the trial to excuse a juror owing to illness or for some other cause and no alternate juror is available. The rule is a restatement of existing practice, the constitutionality of which was approved in *Patton* v. *United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263.

Note to Subdivision (c). This rule changes existing law in so far as it requires the court in a case tried without a jury to make special findings of fact if requested. Cf. Connecticut practice, under which a judge in a criminal case tried by the court without a jury makes findings of fact, *State* v. *Frost*, 105 Conn. 326, 135 A. 446.

1966 AMENDMENT

This amendment adds to the rule a provision added to Civil Rule 52(a) in 1946.

1977 AMENDMENT

The amendment to subdivision (b) makes it clear that the parties, with the approval of the court, may enter into an agreement to have the case decided by less than twelve jurors if one or more jurors are unable or disqualified to continue. For many years the Eastern District of Virginia has used a form entitled, "Waiver of Alternate Jurors." In a substantial percentage of cases the form is signed by the defendant, his attorney, and the Assistant United States Attorney in advance of trial, generally on the morning of trial. It is handled automatically by the courtroom deputy clerk who, after completion, exhibits it to the judge.

This practice would seem to be authorized by existing rule 23(b), but there has been some doubt as to whether the pretrial stipulation is effective unless again agreed to by a defendant at the time a juror or jurors have to be excused. See 8 J. Moore, Federal Practice ¶ 23.04 (2d ed. Cipes, 1969); C. Wright, Federal Practice and Procedure: Criminal § 373 (1969). The proposed amendment is intended to make clear that the pretrial stipulation is an effective waiver, which need not be renewed at the time the incapacity or disqualification of the juror becomes known.

In view of the fact that a defendant can make an effective pretrial waiver of trial by jury or by a jury of twelve, it would seem to follow that he can also effectively waive trial by a jury of twelve in situations where a juror or jurors cannot continue to serve.

As has been the practice under rule 23(b), a stipulation addressed to the possibility that some jurors may later be excused need not be open-ended. That is, the stipulation may be conditioned upon the jury not being reduced below a certain size. See, e.g., *Williams* v. *United States*, 332 F.2d 36 (7th Cir. 1964) (agreement to proceed if no more than 2 jurors excused for illness); *Rogers* v. *United States*, 319 F.2d 5 (7th Cir. 1963) (same).

Subdivision (c) is changed to make clear the deadline for making a request for findings of fact and to provide

that findings may be oral. The oral findings, of course, become a part of the record, as findings of fact are essential to proper appellate review on a conviction resulting from a nonjury trial. *United States* v. *Livingston*, 459 F.2d 797 (3d Cir. 1972).

The meaning of current subdivision (c) has been in some doubt because there is no time specified within which a defendant must make a "request" that the court "find the facts specially." See, e.g., *United States* v. *Rivera*, 444 F.2d 136 (2d Cir. 1971), where the request was not made until the sentence had been imposed. In the opinion the court said: This situation might have raised the interesting and apparently undecided question of when a request for findings under Fed.R.Crim.P. 23(c) is too late, since Rivera's request was not made until the day after sentence was imposed. See generally *Benchwick* v. *United States*, 297 F.2d 330, 335 (9th Cir. 1961); *United States* v. *Morris*, 263 F.2d 594 (7th Cir. 1959).

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 95–354. AMENDMENTS PROPOSED BY THE SUPREME COURT

Subsection (b) of section 2 of the bill simply approves the Supreme Court proposed changes in subdivisions (b) and (c) of rule 23 for the reasons given by the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference.

CONGRESSIONAL APPROVAL OF PROPOSED AMENDMENTS

Section 2(b) of Pub.L. 95–78 provided that: "The amendments proposed by the Supreme Court [in its order of Apr. 26, 1976] to subdivisions (b) and (c) of rule 23 of such Rules of Criminal Procedure [subd. (b) and (c) of this rule] are approved."

1983 AMENDMENT

Rule 23(b)

The amendment to subdivision (b) addresses a situation which does not occur with great frequency but which, when it does occur, may present a most difficult issue concerning the fair and efficient administration of justice. This situation is that in which, after the jury has retired to consider its verdict and any alternate jurors have been discharged, one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury. The problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources. See, e.g., *United States* v. *Meinster*, 484 F.Supp. 442 (S.D.Fla. 1980), aff'd sub nom. *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981) (juror had heart attack during deliberations after "well over four months of trial"); *United States* v. *Barone*, 83 F.R.D. 565 (S.D.Fla. 1979) (juror removed upon recommendation of psychiatrist during deliberations after "approximately six months of trial").

It is the judgment of the Committee that when a juror is lost during deliberations, especially in circumstances like those in *Barone* and *Meinster*, it is essential that there be available a course of action other than mistrial. Proceeding with the remaining 11 jurors, though heretofore impermissible under rule 23(b) absent stipulation by the parties and approval of the court, *United States* v. *Taylor*, 507 F.2d 166 (5th Cir. 1975), is constitutionally permissible. In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court concluded

> the fact that the jury at common law was composed of precisely 12 is an historical accident, unnecessary to effect the purposes of the jury system and wholly without significance "except to mystics." * * * To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions. * * * Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment which would forever dictate the precise number which can constitute a jury.

Williams held that a six-person jury was constitutional because such a jury had the "essential feature of a jury," i.e., "the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence," necessitating only a group "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." This being the case, quite clearly the occasional use of a jury of slightly less than 12, as contemplated by the amendment to rule 23(b), is constitutional. Though the alignment of the Court and especially the separate opinion by Justice Powell in *Apodoca* v. *Oregon*, 406 U.S. 404 (1972), makes it at best uncertain whether less-than-unanimous verdicts would be constitutionally permissible in federal trials, it hardly follows that a requirement of unanimity of a group slightly less than 12 is similarly suspect.

The *Meinster* case clearly reflects the need for a solution other than mistrial. There twelve defendants were named in a 36-count, 100-page indictment for RICO offenses and related violations, and the trial lasted more than four months. Before the jury retired for deliberations, the trial judge inquired of defense counsel whether they would now agree to a jury of less than 12 should a juror later be unable to continue during the deliberations which were anticipated to be lengthy. All defense counsel rejected that proposal. When one juror was excused a day later after suffering a heart attack, all defense counsel again rejected the proposal that deliberations continue with the remaining 11 jurors. Thus, the solution now provided in rule 23(b), stipulation to a jury of less than 12, was not possible in that case, just as it will not be possible in any case in which defense counsel believe some tactical advantage will be gained by retrial. Yet, to declare a mistrial at that point would have meant that over four months of trial time would have gone for naught and that a comparable period of time would have to be expended on retrial. For a variety of reasons, not the least of which is the impact such a retrial would have upon that court's ability to comply with speedy trial limits in other cases, such a result is most undesirable.

That being the case, it is certainly understandable that the trial judge in *Meinster* (as in *Barone*) elected to substitute an alternate juror at that point. Given the rule 23(b) bar on a verdict of less than 12 absent stipulation, *United States* v. *Taylor*, supra, such substitution seemed the least objectionable course of action. But in terms of what change in the Federal Rules of Criminal Procedure is to be preferred in order to facilitate response to such situations in the future, the judgment of the Advisory Committee is that it is far better to permit the deliberations to continue with a jury of 11 than to make a substitution at that point.

In rejecting the substitution-of-juror alternative, the Committee's judgment is in accord with that of most commentators and many courts.

> There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on Criminal Rules doubts as to the desirability and constitutionality of such a procedure. These doubts are as forceful now as they were a quarter century ago. To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Wright, *Federal Practice and Procedure* § 388 (1969). See also Moore, *Federal Practice* par. 24.05 (2d ed. Cipes 1980) ("The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature guilty verdict"); 3 *ABA Standards for Criminal Justice* § 15–2.7, commentary (2d ed. 1980) ("it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion"); *United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975); *People* v. *Ryan*, 19 N.Y.2d 100, 224 N.E.2d 710 (1966). Compare *People* v. *Collins* 17 Cal.3d 687, 131 Cal.Rptr. 782, 522 P.2d 742 (1976); *Johnson* v. *State* 267 Ind. 256, 396 N.E.2d 623 (1977).

The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations. As for the possibility of sending in the alternates at the very beginning with instructions to listen but not to participate until substituted, this scheme is likewise attended by practical difficulties and offends "the cardinal principle that the deliberations of the jury shall remain private and secret in every case." *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964).

The amendment provides that if a juror is excused after the jury has retired to consider its verdict, it is within the discretion of the court whether to declare a mistrial or to permit deliberations to continue with 11 jurors. If the trial has been brief and not much would be lost by retrial, the court might well conclude that the unusual step of allowing a jury verdict by less than 12 jurors absent stipulation should not be taken. On the other hand, if the trial has been protracted the court is much more likely to opt for continuing with the remaining 11 jurors.

Rule 24. Trial Jurors

(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addi-

tion to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is similar to Rule 47(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, and also embodies the practice now followed by many Federal courts in criminal cases. Uniform procedure in civil and criminal cases on this point seems desirable.

Note to Subdivision (b). This rule embodies existing law, 28 U.S.C. former § 424 (now § 1870) (Challenges), with the following modifications. In capital cases the number of challenges is equalized as between the defendant and the United States so that both sides have 20 challenges, which only the defendant has at present. While continuing the existing rule that multiple defendants are deemed a single party for purposes of challenges, the rule vests in the court discretion to allow additional peremptory challenges to multiple defendants and to permit such challenges to be exercised separately or jointly. Experience with cases involving numerous defendants indicates the desirability of this modification.

Note to Subdivision (c). This rule embodies existing law, 28 U.S.C. former § 417a (Alternate jurors), as well as the practice prescribed for civil cases by Rule 47(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, except that the number of possible alternate jurors that may be impaneled is increased from two to four, with a corresponding adjustment of challenges.

1966 AMENDMENT

Experience has demonstrated that four alternate jurors may not be enough for some lengthy criminal trials. See e.g., *United States* v. *Bentvena*, 288 F.2d 442 (2d Cir. 1961); Reports of the Proceedings of the Judicial Conference of the United States, 1961, p. 104. The amendment to the first sentence increases the number authorized from four to six. The fourth sentence is amended to provide an additional peremptory challenge where a fifth or sixth alternate juror is used.

The words "or are found to be" are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn. See *United States* v. *Goldberg*, 330 F.2d 30 (3rd Cir. 1964), cert. den. 377 U.S. 953 (1964).

Rule 25. Judge; Disability

(a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

(b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is similar to Rule 63 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. See also, 28 U.S.C. former § 776 (Bill of exceptions; authentication; signing of by judge).

1966 AMENDMENT

In September, 1963, the Judicial Conference of the United States approved a recommendation of its Committee on Court Administration that provision be made for substitution of a judge who becomes disabled during trial. The problem has become serious because of the increase in the number of long criminal trials. See 1963 Annual Report of the Director of the Administrative Office of the United States Courts, p. 114, reporting a 25% increase in criminal trials lasting more than one week in fiscal year 1963 over 1962.

Subdivision (a).—The amendment casts the rule into two subdivisions and in subdivision (a) provides for substitution of a judge during a jury trial upon his certification that he has familiarized himself with the record of the trial. For similar provisions see Alaska Rules of Crim. Proc., Rule 25; California Penal Code, § 1053.

Subdivision (b).—The words "from the district" are deleted to permit the local judge to act in those situations where a judge who has been assigned from within the district to try the case is, at the time for sentence, etc., back at his regular place of holding court which may be several hundred miles from the place of trial. It is not intended, of course, that substitutions shall be made where the judge who tried the case is available within a reasonable distance from the place of trial.

Rule 26. Taking of Testimony

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

(As amended Nov. 20, 1972.)

References in Text. The Federal Rules of Evidence, referred to in text, are set out in this pamphlet.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal courts. It is based on *Funk* v. *United States*, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369, 93 A.L.R. 1136, and *Wolfle* v. *United States*, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed. 617, which indicated that in the absence of statute the Federal courts in criminal cases are not bound by the State law of evidence, but are guided by common law principles as interpreted by the Federal courts "in the light of reason and experience." The rule does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions. See Homer Cummings, 29 A.B.A.Jour. 655; Vanderbilt, 29 A.B.A.Jour. 377; Holtzoff, 12 George Washington L.R. 119, 131–132; Holtzoff, 3 F.R.D. 445, 453; Howard, 51 Yale L. Jour. 763; Medalie, 4 Lawyers Guild R. (3)1, 5–6.

2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43(a), 28 U.S.C., Appendix), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship, the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in the Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.

3. This rule expressly continues existing statutes governing the admissibility of evidence and the competency and privileges of witnesses. Among such statutes are the following:

8 U.S.C. former:

§ 138 [now §§ 1326, 1328, 1329] (Importation of aliens for immoral purposes; attempt to reenter after deportation; penalty)

28 U.S.C. former:

§ 632 [now 18 U.S.C. § 3481] (Competency of witnesses governed by State laws; defendants in criminal cases)

§ 633 (Competency of witnesses governed by State laws; husband or wife of defendant in prosecution for bigamy)

§ 634 [now 18 U.S.C. § 3486] (Testimony of witnesses before Congress)

§ 638 [now § 1731] (Comparison of handwriting to determine genuineness)

§ 695 [now § 1732] (Admissibility)

§ 695a [now 18 U.S.C. § 3491] (Foreign documents)

46 U.S.C.

§ 193 (Bills of lading to be issued; contents)

1972 AMENDMENT

The first sentence is retained, with appropriate narrowing of the title, since its subject is not covered in the Rules of Evidence. The second sentence is deleted because the Rules of Evidence govern admissibility of evidence, competency of witnesses, and privilege. The language is broadened, however, to take account of the Rules of Evidence and any other rules adopted by the Supreme Court.

Rule 26.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

(Added Feb. 28, 1966, eff. July 1, 1966; amended Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

The original Federal Rules of Criminal Procedure did not contain a provision explicitly regulating the determination of foreign law. The resolution of issues of foreign law, when relevant in federal criminal proceedings, falls within the general compass of Rule 26 which provides for application of "the [evidentiary] principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See Green, Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts 6–7, 17–18 (1962). Although traditional "commonlaw" methods for determining foreign-country law have proved inadequate, the courts have not developed more appropriate practices on the basis of this flexible rule. Cf. Green, op. cit. supra at 26–28. On the inadequacy of common-law procedures for determining foreign law, see, e.g., Nussbaum, Proving the Law of Foreign Countries, 3 Am.J.Comp.L. 60 (1954).

Problems of foreign law that must be resolved in accordance with the Federal Rules of Criminal Procedure are most likely to arise in places such as Washington, D.C., the Canal Zone, Guam, and the Virgin Islands, where the federal courts have general criminal jurisdiction. However, issues of foreign law may also arise in criminal proceedings commenced in other federal districts. For example, in an extradition proceeding, reasonable ground to believe that the person sought to be extradited is charged with, or was convicted of, a crime under the laws of the demanding state must generally be shown. See *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933); *Fernandez* v. *Phillips*, 268 U.S. 311 (1925); Bishop International Law: Cases and Materials (2d ed. 1962). Further, foreign law may be invoked to justify non-compliance with a subpoena duces tecum, *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), and under certain circumstances, as a defense to prosecution. Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909). The content of foreign law may also be relevant in proceedings arising under 18 U.S.C. §§ 1201, 2312–2317.

Rule 26.1 is substantially the same as Civil Rule 44.1. A full explanation of the merits and practicability of the

rule appear in the Advisory Committee's Note to Civil Rule 44.1. It is necessary here to add only one comment to the explanations there made. The second sentence of the rule frees the court from the restraints of the ordinary rules of evidence in determining foreign law. This freedom, made necessary by the peculiar nature of the issue of foreign law, should not constitute an unconstitutional deprivation of the defendant's rights to confrontation of witnesses. The issue is essentially one of law rather than of fact. Furthermore, the cases have held that the Sixth Amendment does not serve as a rigid barrier against the development of reasonable and necessary exceptions to the hearsay rule. See *Kay* v. *United States*, 255 F.2d 476, 480 (4th Cir. 1958), cert. den., 358 U.S. 825 (1958); *Matthews* v. *United States*, 217 F.2d 409, 418 (5th Cir. 1954); *United States* v. *Leathers*, 135 F.2d 507 (2d Cir. 1943); and cf., *Painter* v. *Texas*, 85 S.Ct. 1065 (1965); *Douglas* v. *Alabama*, 85 S.Ct. 1074 (1965).

1972 AMENDMENT

Since the purpose is to free the judge, in determining foreign law, from restrictive evidentiary rules, the reference is made to the Rules of Evidence generally.

Rule 26.2. Production of Statements of Witnesses

(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of Excised Statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

(Added Apr. 30, 1979, eff. Dec. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

S. 1437, 95th Cong., 1st Sess. (1977), would place in the criminal rules the substance of what is now 18 U.S.C. § 3500 (the Jencks Act). Underlying this and certain other additions to the rules contemplated by S. 1437 is the notion that provisions which are purely procedural in nature should appear in the Federal Rules of Criminal Procedure rather than in Title 18. See Reform of the Federal Criminal Laws, Part VI: Hearings on S. 1, S. 716, and S. 1400, Subcomm. on Criminal Laws and Procedures, Senate Judiciary Comm., 93rd Cong., 1st Sess. (statement of Judge Albert B. Maris, at page 5503). Rule 26.2 is identical to the S. 1437 rule except as indicated by the marked additions and deletions. As those changes show, rule 26.2 provides for production of the statements of defense witnesses at trial in essentially the same manner as is now provided for with respect to the statements of government witnesses. Thus, the proposed rule reflects these two judgments: (i) that the subject matter—production of the statements of witnesses—is more appropriately dealt with in the criminal rules; and (ii) that in light of *United States* v. *Nobles*, 422 U.S. 225 (1975), it is important to establish procedures for the production of defense witnesses' statements as well. The rule is not intended to discourage the practice of voluntary disclosure at an earlier time so as to avoid delays at trial.

In *Nobles*, defense counsel sought to introduce the testimony of a defense investigator who prior to trial had interviewed prospective prosecution witnesses and had

prepared a report embodying the essence of their conversation. When the defendant called the investigator to impeach eyewitness testimony identifying the defendant as the robber, the trial judge granted the prosecutor the right to inspect those portions of the investigator's report relating to the witnesses' statements, as a potential basis for cross-examination of the investigator. When the defense declined to produce the report, the trial judge refused to permit the investigator to testify. The Supreme Court unanimously upheld the trial court's actions, finding that neither the Fifth nor Sixth Amendments nor the attorney work product doctrine prevented disclosure of such a document at trial. Noting "the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examinations and the truth-finding process may be enhanced," the Court rejected the notion "that the Fifth Amendment renders criminal discovery 'basically a one-way street,' " and thus concluded that "in a proper case, the prosecution can call upon that same power for production of witness statements that facilitate 'full disclosure of all the [relevant] facts.' "

The rule, consistent with the reasoning in *Nobles*, is designed to place the disclosure of prior relevant statements of a defense witness in the possession of the defense on the same legal footing as is the disclosure of prior statements of prosecution witnesses in the hands of the government under the Jencks Act, 18 U.S.C. § 3500 (which S. 1437 would replace with the rule set out therein). See *United States* v. *Pulvirenti*, 408 F.Supp. 12 (E.D.Mich.1976), holding that under *Nobles* "[t]he obligation [of disclosure] placed on the defendant should be the reciprocal of that placed upon the government * * * [as] defined by the Jencks Act." Several state courts have likewise concluded that witness statements in the hands of the defense at trial should be disclosed on the same basis that prosecution witness statements are disclosed, in order to promote the concept of the trial as a search for truth. See, e.g., *People* v. *Sanders*, 110 Ill. App.2d 85, 249 N.E.2d 124 (1969); *State* v. *Montague*, 55 N.J. 371, 262 A.2d 398 (1970); *People* v. *Damon*, 24 N.Y.2d 256, 299 N.Y.S.2d 830, 247 N.E.2d 651 (1959).

The rule, with minor exceptions, makes the procedure identical for both prosecution and defense witnesses, including the provision directing the court, whenever a claim is made that disclosure would be improper because the statement contains irrelevant matter, to examine the statements in camera and excise such matter as should not be disclosed. This provision acts as a safeguard against abuse and will enable a defendant who believes that a demand is being improperly made to secure a swift and just resolution of the issue.

The treatment as to defense witnesses of necessity differs slightly from the treatment as to prosecution witnesses in terms of the sanction for a refusal to comply with the court's disclosure order. Under the Jencks Act and the rule proposed in S. 1437, if the prosecution refuses to abide by the court's order, the court is required to strike the witness's testimony unless in its discretion it determines that the more serious sanction of a mistrial in favor of the accused is warranted. Under this rule, if a defendant refuses to comply with the court's disclosure order, the court's only alternative is to enter an order striking or precluding the testimony of the witness, as was done in *Nobles*.

Under subdivision (a) of the rule, the motion for production may be made by "a party who did not call the witness." Thus, it also requires disclosure of statements in the possession of either party when the witness is called neither by the prosecution nor the defense but by the court pursuant to the Federal Rules of Evidence. Present law does not deal with this situation, which consistency requires be treated in an identical manner as the disclosure of statements of witnesses called by a party to the case.

Rule 27. Proof of Official Record

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule incorporates by reference Rule 44 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, which provided a simple and uniform method of proving public records and entry or lack of entry therein. The rule does not supersede statutes regulating modes of proof in respect to specific official records. In such cases parties have the option of following the general rule or the pertinent statute. Among the many statutes are: 28 U.S.C. former:

§ 661 [now § 1733] (Copies of department or corporation records and papers; admissibility; seal)
§ 662 [now § 1733] (Same; in office of General Counsel of the Treasury)
§ 663 [now § 1733] (Instruments and papers of Comptroller of Currency; admissibility)
§ 664 [now § 1733] (Organization certificates of national banks; admissibility)
§ 665 [now § 1733] (Transcripts from books of Treasury in suits against delinquents; admissibility)
§ 666 [now § 1733] (Same; certificate by Secretary or Assistant Secretary)
§ 668 [now 18 U.S.C. § 3497] (Same; indictments for embezzlement of public moneys)
§ 669 (Copies of returns in returns office admissible)
§ 670 [now § 1743] (Admissibility of copies of statements of demands by Post Office Department)
§ 671 [now § 1733] (Admissibility of copies of post office records and statement of accounts)
§ 672 [See § 1733] (Admissibility of copies of records in General Land Office)
§ 673 [now § 1744] (Admissibility of copies of records, and so forth, of Patent Office)
§ 674 [now § 1745] (Copies of foreign letters patent as prima facie evidence)
§ 675 (Copies of specifications and drawings of patents admissible)
§ 676 [now § 1736] (Extracts from Journals of Congress admissible when injunction of secrecy removed)
§ 677 [now § 1740] (Copies of records in offices of United States consuls admissible)
§ 678 (Books and papers in certain district courts)
§ 679 (Records in clerks' offices, western district of North Carolina)

§ 680 (Records in clerks' offices of former district of California)
§ 681 [now § 1734] (Original records lost or destroyed; certified copy admissible)
§ 682 [now § 1734] (Same; when certified copy not obtainable)
§ 685 [now § 1735] (Same; certified copy of official papers)
§ 687 [now § 1738] (Authentication of legislative acts; proof of judicial proceedings of State)
§ 688 [now § 1739] (Proofs of records in offices not pertaining to courts)
§ 689 [now § 1742] (Copies of foreign records relating to land titles)
§§ 695a–695h [now 18 U.S.C. §§ 3491–3496; 22 U.S.C. § 1204; § 1741] (Foreign documents)
1 U.S.C. former:
§ 30 [now § 112] (Statutes at Large; contents; admissibility in evidence)
§ 30a [now § 113] ("Little and Brown's" edition of laws and treaties competent evidence of Acts of Congress)
§ 54 [now § 204] (Codes and Supplements as establishing prima facie the Laws of United States and District of Columbia, citation of Codes and Supplements)
§ 55 [now § 209] (Copies of Supplements to Code of Laws of United States and of District of Columbia Code and Supplements; conclusive evidence of original)
5 U.S.C. former:
§ 490 [now 28 U.S.C. § 1733] (Records of Department of Interior; authenticated copies as evidence)
8 U.S.C. former:
§ 717(b) [now §§ 1435, 1482] (Former citizens of United States excepted from certain requirements; citizenship lost by spouse's alienage or loss of United States citizenship, or by entering armed forces of foreign state or acquiring its nationality)
§ 727(g) [now § 1443] (Administration of naturalization laws; rules and regulations; instruction in citizenship; forms; oaths; depositions; documents in evidence; photographic studio)
15 U.S.C. former:
§ 127 [now § 1057(e)] (Trade-marks; copies of records as evidence)
U.S.C. Title 20:
§ 52 (Smithsonian Institution; evidence of title to site and buildings)
25 U.S.C.:
§ 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)
31 U.S.C.:
§ 46 (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)
38 U.S.C. former:
§ 11g [now § 202] (Seal of Veterans' Administration; authentication of copies of records)
43 U.S.C.:
§ 57 (Authenticated copies or extracts from records as evidence)
§ 58 (Transcripts from records of Louisiana)
§ 59 (Official papers in office of surveyor general in California; papers; copies)
§ 83 (Transcripts of records as evidence)
44 U.S.C. former:
§ 300h [now §§ 397, 399] (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions)
§ 307 (Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation)
47 U.S.C.:
§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)
49 U.S.C.:
§ 16 (Orders of Commission and enforcement thereof; forfeitures—(13) copies of schedules, tariffs, contracts, etc., kept as public records; evidence)

Rule 28. Interpreters

The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

The power of the court to call its own witnesses, though rarely invoked, is recognized in the Federal courts, *Young* v. *United States*, 107 F.2d 490, C.C.A.5th; *Litsinger* v. *United States*, 44 F.2d 45, C.C.A.7th. This rule provides a procedure whereby the court may, if it chooses, exercise this power in connection with expert witnesses. The rule is based, in part, on the Uniform Expert Testimony Act, drafted by the Commissioners on Uniform State Laws, Hand Book of the National Conference of Commissioners on Uniform State Laws (1937), 337; see, also, Wigmore—Evidence, 3d Ed., sec. 563; A.L.I. Code of Criminal Procedure, secs. 307–309; National Commission on Law of Observance and Enforcement—Report on Criminal Procedure, 37. Similar provisions are found in the statutes of a number of States: Wisconsin—Wis. Stat. (1941), sec. 357.12; Indiana—Ind. Stat. Ann. (Burns, 1933), sec. 9–1702; California—Cal. Pen. Code (Deering, 1941), sec. 1027.

1966 AMENDMENT

Subdivision (a).—The original rule is made a separate subdivision. The amendment permits the court to inform the witness of his duties in writing since it often constitutes an unnecessary inconvenience and expense to require the witness to appear in court for such purpose.

Subdivision (b).—This new subdivision authorizes the court to appoint and provide for the compensation of interpreters. General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel.

Interpreters may also be needed where a witness or a defendant is deaf.

1972 AMENDMENT

Subdivision (a). This subdivision is stricken, since the subject of court-appointed expert witnesses is covered in Evidence Rule 706 in detail.

Subdivision (b). The provisions of subdivision (b) are retained. Although Evidence Rule 703 specifies the qualifications of interpreters and the form of oath to be administered to them, it does not cover their appointment or compensation.

Rule 29. Motion for Judgment of Acquittal

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. The purpose of changing the name of a motion for a directed verdict to a motion for judgment of acquittal is to make the nomenclature accord with the realities. The change of nomenclature, however, does not modify the nature of the motion or enlarge the scope of matters that may be considered.

2. The second sentence is patterned on New York Code of Criminal Procedure, sec. 410.

3. The purpose of the third sentence is to remove the doubt existing in a few jurisdictions on the question whether the defendant is deemed to have rested his case if he moves for a directed verdict at the close of the prosecution's case. The purpose of the rule is expressly to preserve the right of the defendant to offer evidence in his own behalf, if such motion is denied. This is a restatement of the prevailing practice, and is also in accord with the practice prescribed for civil cases by Rule 50(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (b). This rule is in substance similar to Rule 50(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, and permits the court to render judgment for the defendant notwithstanding a verdict of guilty. Some Federal courts have recognized and approved the use of a judgment non obstante veredicto for the defendant in a criminal case, *Ex parte United States*, 101 F.2d 870, C.C.A.7th, affirmed by an equally divided court, *United States* v. *Stone*, 308 U.S. 519, 60 S.Ct. 177, 84 L.Ed. 441. The rule sanctions this practice.

1966 AMENDMENT

Subdivision (a).—A minor change has been made in the caption.

Subdivision (b).—The last three sentences are deleted with the matters formerly covered by them transferred to the new subdivision (c).

Subdivision (c).—The new subdivision makes several changes in the former procedure. A motion for judgment of acquittal may be made after discharge of the jury whether or not a motion was made before submission to the jury. No legitimate interest of the government is intended to be prejudiced by permitting the court to direct an acquittal on a post-verdict motion. The constitutional requirement of a jury trial in criminal cases is primarily a right accorded to the defendant. Cf. *Adams* v. *United States, ex rel. McCann*, 317 U.S. 269 (1942); *Singer* v. *United States*, 380 U.S. 24 (1965); Note, 65 Yale L.J. 1032 (1956).

The time in which the motion may be made has been changed to 7 days in accordance with the amendment to Rule 45(a) which by excluding Saturday from the days to be counted when the period of time is less than 7 days would make 7 days the normal time for a motion required to be made in 5 days. Also the court is authorized to extend the time as is provided for motions for new trial (Rule 33) and in arrest of judgment (Rule 34).

References in the original rule to the motion for a new trial as an alternate to the motion for judgment of acquittal and to the power of the court to order a new trial have been eliminated. Motions for new trial are adequately covered in Rule 33. Also the original wording is subject to the interpretation that a motion for judgment of acquittal gives the court power to order a new trial even though the defendant does not wish a new trial and has not asked for one.

Rule 29.1. Closing Argument

After the closing of evidence the prosecution shall open the argument. The defense shall be

permitted to reply. The prosecution shall then be permitted to reply in rebuttal.
(Added Apr. 22, 1974, eff. Dec. 1, 1975.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is designed to control the order of closing argument. It reflects the Advisory Committee's view that it is desirable to have a uniform federal practice. The rule is drafted in the view that fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 29.1 is a new rule that was added to regulate closing arguments. It prescribes that the government shall make its closing argument and then the defendant shall make his. After the defendant has argued, the government is entitled to reply in rebuttal.

B. Committee Action. The Committee endorses and adopts this proposed rule in its entirety. The Committee believes that as the Advisory Committee Note has stated, fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply. Rule 29.1 does not specifically address itself to what happens if the prosecution waives its initial closing argument. The Committee is of the view that the prosecutor, when he waives his initial closing argument, also waives his rebuttal. [See the remarks of Senior United States Circuit Judge J. Edward Lumbard in Hearings II, at 207.]

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.
(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule corresponds to Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, the second sentence alone being new. It seemed appropriate that on a point such as instructions to juries there should be no difference in procedure between civil and criminal cases.

1966 AMENDMENT

The amendment requires the court, on request of any party, to require the jury to withdraw in order to permit full argument of objections to instructions.

Rule 31. Verdict

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.
(As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is a restatement of existing law and practice. It does not embody any regulation of sealed verdicts, it being contemplated that this matter would be governed by local practice in the various district courts. The rule does not affect the existing statutes relating to qualified verdicts in cases in which capital punishment may be imposed, 18 U.S.C. former § 408a (now § 1201) (Kidnapped persons); 18 U.S.C. former § 412a (now § 1992) (Wrecking trains); 18 U.S.C. former § 567 (now § 1111) (Verdicts; qualified verdicts).

Note to Subdivision (b). This rule is a restatement of existing law, 18 U.S.C. former § 566 (Verdicts; several joint defendants).

Note to Subdivision (c). This rule is a restatement of existing law, 18 U.S.C. former § 565 (Verdicts; less offense than charged).

Note to Subdivision (d). This rule is a restatement of existing law and practice, *Mackett* v. *United States*, 90

F.2d 462, 465, C.C.A.7th; *Bruce* v. *Chestnut Farms Chevy Chase Dairy*, 126 F.2d 224, App.D.C.

1972 AMENDMENT

Subdivision (e) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2).

The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved. See Advisory Committee Note to rule 7(c)(2).

Although special verdict provisions are rare in criminal cases, they are not unknown. See *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969), especially footnote 41 where authorities are listed.

VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The presentence report shall contain—

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

(3) Disclosure.

(A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report

contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and his counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and his counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) Plea Withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) [Revocation of Probation.] (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980)

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975, as amended Pub.L. 93–361, July 30, 1974, 88 Stat. 397 and Pub.L. 94–64, § 2, July 31, 1975, 89 Stat. 370; July 31, 1975, Pub.L. 94–64, § 3(31)–(34), 89 Stat. 376; Apr. 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980; Pub.L. 97–291, § 3, Oct. 12, 1982, 96 Stat. 1249; Apr. 28, 1983, eff. Aug. 1, 1983.)

Amendment of Rule

Pub.L. 98–473, Title II, §§ 215(a), 235, Oct. 12, 1984, 98 Stat. 2014, 2031, provided that, effective on Nov. 1, 1986, this rule is amended:

(1) by deleting subdivision (a)(1) and inserting in lieu thereof the following:

"(1) Imposition of Sentence. Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

"(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision

(c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

"(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

"(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.";

(2) in subdivision (a)(2), by adding ", including any right to appeal the sentence," after "right to appeal" in the first sentence;

(3) in subdivision (a)(2), by adding ", except that the court shall advise the defendant of any right to appeal his sentence" after "nolo contendere" in the second sentence;

(4) by amending the first sentence of subdivision (c)(1) to read as follows:

"A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.";

(5) by amending subdivision (c)(2) to read as follows:

"(2) Report. The report of the presentence investigation shall contain—

"(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

"(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

"(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

"(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

"(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

"(F) such other information as may be required by the court.";

(6) in subdivision (c)(3)(A), by deleting "exclusive of any recommendations as to sentence" and inserting in lieu thereof ", including the information required by subdivision (c)(2) but not including any final recommendation as to sentence,";

(7) in subdivision (c)(3)(D), delete "or the Parole Commission";

(8) in subdivision (c)(3)(F), delete "or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c)" and substitute "pursuant to 18 U.S.C. § 3552(b)"; and

(9) by deleting "imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c)," in subdivision (d).

AMENDMENTS

1982—Subdiv. (c)(2). Pub. L. 97–291 substituted provision directing that the presentence report contain any prior criminal record of the defendant, a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior, information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense, and any other information that may aid the court in sentencing, including the restitution need of any victim of the offense, for provision requiring that the report of the presentence investigation would contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as might be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as might be required by the court.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–291 effective Oct. 12, 1982, see section 9(a) of Pub. L. 97–291 set out as a note under section 1512 of this title.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is substantially a restatement of existing procedure. Rule I of the Crimi-

nal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688]. See Rule 43 relating to the presence of the defendant.

Note to Subdivision (b). This rule is substantially a restatement of existing procedure. Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

Note to Subdivision (c). The purpose of this provision is to encourage and broaden the use of presentence investigations, which are now being utilized to good advantage in many cases. See, "The Presentence Investigation" published by Administrative Office of the United States Courts, Division of Probation.

Note to Subdivision (d). This rule modifies existing practice by abrogating the ten-day limitation on a motion for leave to withdraw a plea of guilty. See Rule II(4) of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

Note to Subdivision (e). See 18 U.S.C. former § 724 et seq. (now § 3651 et seq.).

1966 AMENDMENT

Subdivision (a)(1).—The amendment writes into the rule the holding of the Supreme Court that the court before imposing sentence must afford an opportunity to the defendant personally to speak in his own behalf. See *Green* v. *United States*, 365 U.S. 301 (1961); *Hill* v. *United States*, 368 U.S. 424 (1962). The amendment also provides an opportunity for counsel to speak on behalf of the defendant.

Subdivision (a)(2).—This amendment is a substantial revision and a relocation of the provision originally found in Rule 37(a)(2): "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant." The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e.g., *Hodges* v. *United States*, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis. The provision is added here because this rule seems the most appropriate place to set forth a procedure to be followed by the court at the time of sentencing.

Subdivision (c)(2).—It is not a denial of due process of law for a court in sentencing to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it. *Williams* v. *New York*, 337 U.S. 241 (1949); *Williams* v. *Oklahoma*, 358 U.S. 576 (1959). However, the question whether as a matter of policy the defendant should be accorded some opportunity to see and refute allegations made in such reports has been the subject of heated controversy. For arguments favoring disclosure, see Tappan, Crime, Justice, and Correction, 558 (1960); Model Penal Code, 54–55 (Tent. Draft No. 2, 1954); Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Prob., March 1964, p. 8; Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv.L.Rev. 1281, 1291–2 (1952); Note, Employment of Social Investigation Reports in Criminal and Juvenile Proceedings, 58 Colum.L.Rev. 702 (1958); cf. Kadish, The Advocate and the Expert: Counsel in the Peno-Correctional Process, 45 Minn.L.Rev. 803, 806, (1961). For arguments opposing disclosure, see Barnett and Gronewold, Confidentiality of the Presentence Report, 26 Fed. Prob. March 1962, p. 26; Judicial Conference Committee on Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—a Survey (1964); Keve, The Probation Officer Investigates, 6–15 (1960); Parsons, The Presentence Investigation Report Must be Preserved as a Confidential Document, 28 Fed. Prob. March 1964, p. 3; Sharp, The Confidential Nature of Presentence Reports, 5 Cath.U.L.Rev. 127 (1955); Wilson, A New Arena is Emerging to Test the Confidentiality of Presentence Reports, 25 Fed. Prob. Dec. 1961, p. 6; Federal Judge's Views on Probation Practices, 24 Fed. Prob. March 1960, p. 10.

In a few jurisdictions the defendant is given a right of access to the presentence report. In England and California a copy of the report is given to the defendant in every case. English Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, § 43; Cal. Pen. C. § 1203. In Alabama the defendant has a right to inspect the report. Ala. Code, Title 42, § 23. In Ohio and Virginia the probation officer reports in open court and the defendant is given the right to examine him on his report. Ohio Rev. Code, § 2947.06; Va. Code, § 53–278.1. The Minnesota Criminal Code of 1963, § 609.115(4), provides that any presentence report "shall be open for inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on the request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs." Cf. Model Penal Code § 7.07(5) (P.O.D. 1962): "Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed."

Practice in the federal courts is mixed, with a substantial minority of judges permitting disclosure while most deny it. See the recent survey prepared for the Judicial Conference of the District of Columbia by the Junior Bar Section of the Bar Association of the District of Columbia, reported in Conference Papers on Discovery in Federal Criminal Cases, 33 F.R.D. 101, 125–127 (1963). See also Gronewold, Presentence Investigation Practices in the Federal Probation System, Fed. Prob. Sept. 1958, pp. 27, 31. For divergent judicial opinions see *Smith* v. *United States*, 223 F.2d 750, 754 (5th Cir. 1955) (supporting disclosure); *United States* v. *Durham*, 181 F.Supp. 503 (D.D.C. 1960) (supporting secrecy).

Substantial objections to compelling disclosure in every case have been advanced by federal judges, including many who in practice often disclose all or parts of presentence reports. See Judicial Conference Committee on the Administration of the Probation System, Judicial Opinion on Proposed Change in Rule 32(c) of the Federal Rules of Criminal Procedure—A Survey (1964). Hence, the amendment goes no further than to make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel. It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences. For a description of such a practice in one district, see Thomsen, Confidentiality of the Presentence Report: A Middle Position, 28 Fed. Prob., March 1964, p. 8.

It is also provided that any material disclosed to the defendant or his counsel shall be disclosed to the attorney for the government. Such disclosure will permit the government to participate in the resolution of any factual questions raised by the defendant.

Subdivision (f).—This new subdivision writes into the rule the procedure which the cases have derived from the provision in 18 U.S.C. § 3653 that a person arrested for violation of probation "shall be taken before the court" and that thereupon the court may revoke the probation. See *Escoe* v. *Zerbst*, 295 U.S. 490 (1935); *Brown* v. *United States*, 236 F.2d 253 (9th Cir. 1956) certiorari denied 356 U.S. 922 (1958). Compare Model Penal Code § 301.4 (P.O.D. 1962); Hink, The Application of Constitutional Standards of Protection to Probation, 29 U.Chi.L. Rev. 483 (1962).

1972 AMENDMENT

Subdivision (b)(2) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2).

18 U.S.C. § 1963(c) provides for property seizure and disposition. In part it states:

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper.

Although not specifically provided for in the Comprehensive Drug Abuse Prevention and Control Act of 1970, the provision of Title II, § 408(a)(2) forfeiting "profits" or "interest" will need to be implemented procedurally, and therefore new rule 32(b)(2) will be applicable also to that legislation.

For a brief discussion of the procedural implications of a criminal forfeiture, see Advisory Committee Note to rule 7(c)(2).

1974 AMENDMENT

Subdivision (a)(1) is amended by deleting the reference to commitment or release pending sentencing. This issue is dealt with explicitly in the proposed revision of rule 46(c).

Subdivision (a)(2) is amended to make clear that there is no duty on the court to advise the defendant of the right to appeal after sentence is imposed following a plea of guilty or nolo contendere.

To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. See American Bar Association Standards Relating to Criminal Appeals § 2.1(b) (Approved Draft, 1970), limiting the court's duty to advice to "contested cases."

The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers.

Former rule 32(a)(2) imposes a duty only upon conviction after "trial on a plea of not guilty." The few federal cases dealing with the question have interpreted rule 32(a)(2) to say that the court has no duty to advise defendant of his right to appeal after conviction following a guilty plea. *Burton* v. *United States*, 307 F.Supp. 448, 450 (D.Ariz. 1970); *Alaway* v. *United States*, 280 F.Supp. 326, 336 (C.D.Calif. 1968); *Crow* v. *United States*, 397 F.2d 284, 285 (10th Cir. 1968).

Prior to the 1966 amendment of rule 32, the court's duty was even more limited. At that time [rule 37(a)(2)] the court's duty to advise was limited to those situations in which sentence was imposed after trial upon a not guilty plea of a defendant not represented by counsel. 8A J. Moore, Federal Practice ¶ 32.01[3] (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 528 (1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32:11 (1967).

With respect to appeals in forma pauperis, see appellate rule 24.

Subdivision (c)(1) makes clear that a presentence report is required except when the court otherwise directs for reasons stated of record. The requirement of reasons on the record for not having a presentence report is intended to make clear that such a report ought to be routinely required except in cases where there is a reason for not doing so. The presentence report is of great value for correctional purposes and will serve as a valuable aid in reviewing sentences to the extent that sentence review may be authorized by future rule change. For an analysis of the current rule as it relates to the situation in which a presentence investigation is required, see C. Wright, Federal Practice and Procedure: Criminal § 522 (1969); 8A J. Moore, Federal Practice ¶ 32.03[1] (2d ed. Cipes 1969).

Subdivision (c)(1) is also changed to permit the judge, after obtaining defendant's consent, to see the presentence report in order to decide whether to accept a plea agreement, and also to expedite the imposition of sentence in a case in which the defendant has indicated that he may plead guilty or nolo contendere.

Former subdivision (c)(1) provides that "The report shall not be submitted to the court * * * unless the defendant has pleaded guilty * * *." This precludes a judge from seeing a presentence report prior to the acceptance of the plea of guilty. L. Orfield, Criminal Procedure Under the Federal Rules § 32:35 (1967); 8A J.

Moore, Federal Practice ¶ 32.03[2], p. 32–22 (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 523, p. 392 (1969); *Gregg* v. *United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969).

Because many plea agreements will deal with the sentence to be imposed, it will be important, under rule 11, for the judge to have access to sentencing information as a basis for deciding whether the plea agreement is an appropriate one.

It has been suggested that the problem be dealt with by allowing the judge to indicate approval of the plea agreement subject to the condition that the information in the presentence report is consistent with what he has been told about the case by counsel. See American Bar Association, Standards Relating to Pleas of Guilty § 3.3 (Approved Draft, 1963); President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society 136 (1967).

Allowing the judge to see the presentence report prior to his decision as to whether to accept the plea agreement is, in the view of the Advisory Committee, preferable to a conditional acceptance of the plea. See Enker, Perspectives on Plea Bargaining, Appendix A of President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts at 117 (1967). It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.

There is presently authority to have a presentence report *prepared* prior to the acceptance of the plea of guilty. In *Gregg* v. *United States*, 394 U.S. 489, 491, 89 S.Ct. 1134 22 L.Ed.2d 442 (1969), the court said that the "language [of rule 32] clearly permits the preparation of a presentence report before guilty plea or conviction * *." In footnote 3 the court said:

The history of the rule confirms this interpretation. The first Preliminary Draft of the rule would have required the consent of the defendant or his attorney to commence the investigation before the determination of guilt. Advisory Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc., Preliminary Draft 130, 133 (1943). The Second Preliminary Draft omitted this requirement and imposed no limitation on the time when the report could be made and submitted to the court. Advisory Committee on Rules of Criminal Procedure, Fed.Rules Crim.Proc. Second Preliminary Draft 126–128 (1944). The third and final draft, which was adopted as Rule 32, was evidently a compromise between those who opposed any time limitation, and those who preferred that the entire investigation be conducted after determination of guilt. See 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32.2 (1967).

Where the judge rejects the plea agreement after seeing the presentence report, he should be free to recuse himself from later presiding over the trial of the case. This is left to the discretion of the judge. There are instances involving prior convictions where a judge may have seen a presentence report, yet can properly try a case on a plea of not guilty. *Webster* v. *United States*, 330 F.Supp. 1080 (D.C., 1971). Unlike the situation in *Gregg* v. *United States*, subdivision (e)(3) provides for disclosure of the presentence report to the defendant, and this will enable counsel to know whether the information thus made available to the judge is likely to be prejudicial. Presently trial judges who decide pretrial motions to suppress illegally obtained evidence are not, for that reason alone, precluded from presiding at a later trial.

Subdivision (c)(3)(A) requires disclosure of presentence information to the defense, exclusive of any recommendation of sentence. The court is required to disclose the report to defendant or his counsel unless the court is of the opinion that disclosure would seriously interfere with rehabilitation, compromise confidentiality, or create risk of harm to the defendant or others.

Any recommendation as to sentence should not be disclosed as it may impair the effectiveness of the probation officer if the defendant is under supervision on probation or parole.

The issue of disclosure of presentence information to the defense has been the subject of recommendations from the Advisory Committee in 1944, 1962, 1964, and 1966. The history is dealt with in considerable detail in C. Wright, Federal Practice and Procedure: Criminal § 524 (1969), and 8A J. Moore, Federal Practice ¶ 32.03[4] (2d ed. Cipes 1969).

In recent years, three prestigious organizations have recommended that the report be disclosed to the defense. See American Bar Association, Standards Relating to Sentencing Alternatives and Procedures § 4.4 (Approved Draft, 1968); American Law Institute Model Penal Code § 7.07(5) (P.O.D. 1962); National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963). This is also the recommendation of the President's Commission on Law Enforcement and Administration of Justice. The Challenge of Crime in a Free Society (1967) at p. 145.

In the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report.

The arguments for and against disclosure are well known and are effectively set forth in American Bar Association Standards Relating to Sentencing Alternatives and Procedures, § 4.4 Commentary at pp. 214–225 (Approved Draft, 1968). See also Lehrich, The Use and Disclosure of Presentence Reports in the United States, 47 F.R.D. 225 (1969).

A careful account of existing practices in Detroit, Michigan and Milwaukee, Wisconsin is found in R. Dawson, Sentencing (1969).

Most members of the federal judiciary have, in the past, opposed compulsory disclosure. See the view of District Judge Edwin M. Stanley, American Bar Association Standards Relating to Sentencing Alternatives and Procedures. Appendix A. (Appendix A also contains the results of a survey of all federal judges showing that the clear majority opposed disclosure.)

The Advisory Committee is of the view that accuracy of sentencing information is important not only to the defendant but also to effective correctional treatment of a convicted offender. The best way of insuring accuracy is disclosure with an opportunity for the defendant and counsel to point out to the court information thought by the defense to be inaccurate, incomplete, or otherwise

misleading. Experience in jurisdictions which require disclosure does not lend support to the argument that disclosure will result in less complete presentence reports or the argument that sentencing procedures will become unnecessarily protracted. It is not intended that the probation officer would be subjected to any rigorous examination by defense counsel, or that he will even be sworn to testify. The proceedings may be very informal in nature unless the court orders a full hearing.

Subdivision (c)(3)(B) provides for situations in which the sentencing judge believes that disclosure should not be made under the criteria set forth in subdivision (c)(3)(A). He may disclose only a summary of that factual information "to be relied on in determining sentence." This is similar to the proposal of the American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 4.4(b) and Commentary at pp. 216–224.

Subdivision (c)(3)(D) provides for the return of disclosed presentence reports to insure that they do not become available to unauthorized persons. See National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963): "Such reports shall be part of the record but shall be sealed and opened only on order of the court."

Subdivision (c)(3)(E) makes clear that diagnostic studies under 18 U.S.C. §§ 4208(b), 5010(c), or 5034 are covered by this rule and also that 18 U.S.C. § 4252 is included within the disclosure provisions of subdivision (c). Section 4252 provides for the presentence examination of an "eligible offender" who is believed to be an addict to determine whether "he is an addict and is likely to be rehabilitated through treatment."

Both the Organized Crime Control Act of 1970 [§ 3775(b)] and the Comprehensive Drug Abuse Prevention and Control Act of 1970 [§ 409(b)] have special provisions for presentence investigation in the implementation of the dangerous special offender provision. It is however, unnecessary to incorporate them by reference in rule 32 because each contains a specific provision requiring disclosure of the presentence report. The judge does have authority to withhold some information "in extraordinary cases" provided notice is given the parties and the court's reasons for withholding information are made part of the record.

Subdivision (e) is amended to clarify the meaning.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court Rule 32 of the Federal Rules of Criminal Procedure deals with sentencing matters.

Proposed subdivision (a)(2) provides that the court is not dutybound to advise the defendant of a right to appeal when the sentence is imposed following a plea of guilty or nolo contendere.

Proposed subdivision (e) provides that the probation service must make a presentence investigation and report unless the court orders otherwise "for reasons stated on the record." The presentence report will not be submitted to the court until after the defendant pleads nolo contendere or guilty, or is found guilty, unless the defendant consents in writing. Upon the defendant's request, the court must permit the defendant to read the presentence report, except for the recommendation as to sentence. However, the court may decline to let the defendant read the report if it contains (a) diagnostic opinion that might seriously disrupt a rehabilitation program, (b) sources of information obtained upon a promise of confidentiality, or (c) any other information that, if disclosed, might result in harm to the defendant or other persons. The court must give the defendant an opportunity to comment upon the presentence report. If the court decides that the defendant should not see the report, then it must provide the defendant, orally or in writing, a summary of the factual information in the report upon which it is relying in determining sentence. No party may keep the report or make copies of it.

B. Committee Action. The Committee added language to subdivision (a)(1) to provide that the attorney for the government may speak to the court at the time of sentencing. The language does not require that the attorney for the government speak but permits him to do so if he wishes.

The Committee recast the language of subdivision (c)(1), which defines when presentence reports must be obtained. The Committee's provision makes it more difficult to dispense with a presentence report. It requires that a presentence report be made unless (a) the defendant waives it, or (b) the court finds that the record contains sufficient information to enable the meaningful exercise of sentencing discretion and explains this finding on the record. The Committee believes that presentence reports are important aids to sentencing and should not be dispensed with easily.

The Committee added language to subdivision (c)(3)(A) that permits a defendant to offer testimony or information to rebut alleged factual inaccuracies in the presentence report. Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect. The Committee's addition to subdivision (c)(3)(A) will help insure the accuracy of the presentence report.

The Committee added language to subdivision (c)(3)(D) that gives the court the discretion to permit either the prosecutor or the defense counsel to retain a copy of the presentence report. There may be situations when it would be appropriate for either or both of the parties to retain the presentence report. The Committee believes that the rule should give the court the discretion in such situations to permit the parties to retain their copies.

1979 AMENDMENT

Note to Subdivision (c)(3)(E). The amendment to rule 32(c)(3)(E) is necessary in light of recent changes in the applicable statutes.

Note to Subdivision (f). This subdivision is abrogated. The subject matter is now dealt with in greater detail in proposed new rule 32.1.

1983 AMENDMENT

Rule 32(a)(1)

Subdivision (a)(1) has been amended so as to impose upon the sentencing court the additional obligation of determining that the defendant and his counsel have had an opportunity to read the presentence investigation re-

port or summary thereof. This change is consistent with the amendment of subdivision (c)(3), discussed below, providing for disclosure of the report (or, in the circumstances indicated, a summary thereof) to *both* defendant *and* his counsel *without request.* This amendment is also consistent with the findings of a recent empirical study that under present rule 32 meaningful disclosure is often lacking and "that some form of judicial prodding is necessary to achieve full disclosure." Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts,* 93 Harv.L.Rev. 1613, 1651 (1980):

> The defendant's interest in an accurate and reliable presentence report does not cease with the imposition of sentence. Rather, these interests are implicated at later stages in the correctional process by the continued use of the presentence report as a basic source of information in the handling of the defendant. If the defendant is incarcerated, the presentence report accompanies him to the correctional institution and provides background information for the Bureau of Prisons' classification summary, which, in turn, determines the defendant's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs. The presentence report also plays a crucial role during parole determination. Section 4207 of the Parole Commission and Reorganization Act directs the parole hearing examiner to consider, if available, the presentence report as well as other records concerning the prisoner. In addition to its general use as background at the parole hearing, the presentence report serves as the primary source of information for calculating the inmate's parole guideline score.

Though it is thus important that the defendant be aware *now* of all these potential uses, the Advisory Committee has considered but not adopted a requirement that the trial judge specifically advise the defendant of these matters. The Committee believes that this additional burden should not be placed upon the trial judge, and that the problem is best dealt with by a form attached to the presentence report, to be signed by the defendant, advising of these potential uses of the report. This suggestion has been forwarded to the Probation Committee of the Judicial Conference.

Rule 32(c)(3)(A), (B) & (C)

Three important changes are made in subdivision (c)(3): disclosure of the presentence report is no longer limited to those situations in which a request is made; disclosure is now provided to both defendant and his counsel; and disclosure is now required a reasonable time before sentencing. These changes have been prompted by findings in a recent empirical study that the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information. In 14 districts, disclosure is made only on request, and such requests are received in fewer than 50% of the cases. Forty-two of 92 probation offices do not provide automatic notice to defendant or counsel of the availability of the report; in 18 districts, a majority of the judges do not provide any notice of the availability of the report, and in 20 districts such notice is given only on the day of sentencing. In 28 districts, the report itself is not disclosed until the day of sentencing in a majority of cases. Thirty-one courts generally disclose the report only to counsel and not to the defendant, unless the defendant makes a specific request. Only 13 districts disclose the presentence report to both defendant and counsel prior to the day of sentencing in 90% or more of the cases. Fennell & Hall, supra, at 1640–49.

These findings make it clear that rule 32 in its present form is failing to fulfill its purpose. Unless disclosure is made sufficiently in advance of sentencing to permit the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated. Similarly, if the report is not made available to the defendant and his counsel in a timely fashion, and if disclosure is only made on request, their opportunity to review the report may be inadequate. Finally, the failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel.

The additional change to subdivision (c)(3)(C) is intended to make it clear that the government's right to disclosure does not depend upon whether the defendant elects to exercise his right to disclosure.

Rule 32(c)(3)(D)

Subdivision (c)(3)(D) is entirely new. It requires the sentencing court, as to each matter controverted, either to make a finding as to the accuracy of the challenged factual proposition or to determine that no reliance will be placed on that proposition at the time of sentencing. This new provision also requires that a record of this action accompany any copy of the report later made available to the Bureau of Prisons or Parole Commission.

As noted above, the Bureau of Prisons and the Parole Commission made substantial use of the presentence investigation report. Under current practice, this can result in reliance upon assertions of fact in the report in the making of critical determinations relating to custody or parole. For example, it is possible that the Bureau or Commission, in the course of reaching a decision on such matters as institution assignment, eligibility for programs, or computation of salient factors, will place great reliance upon factual assertions in the report which are in fact untrue and which remained unchallenged at the time of sentencing because defendant or his counsel deemed the error unimportant in the sentencing context (e.g., where the sentence was expected to conform to an earlier plea agreement, or where the judge said he would disregard certain controverted matter in setting the sentence).

The first sentence of new subdivision (c)(3)(D) is intended to ensure that a record is made as to exactly what resolution occurred as to controverted matter. The second sentence is intended to ensure that this record comes to the attention of the Bureau or Commission when these agencies utilize the presentence investigation report. In

current practice, "less than one-fourth of the district courts (twenty of ninety-two) communicate to the correctional agencies the defendant's challenges to information in the presentence report and the resolution of these challenges." Fennell & Hall, supra, at 1680.

New subdivision (c)(3)(D) does not impose an onerous burden. It does not even require the preparation of a transcript. As is now the practice in some courts, these findings and determinations can be simply entered onto a form which is then appended to the report.

Rule 32(c)(3)(E) & (F)

Former subdivisions (c)(3)(D) and (E) have been renumbered as (c)(3)(E) and (F). The only change is in the former, necessitated because disclosure is now to defendant and his counsel.

The issue of access to the presentence report at the institution was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel.

Rule 32(d)

The amendment to Rule 32(d) is intended to clarify (i) the standard applicable to plea withdrawal under this rule, and (ii) the circumstances under which the appropriate avenue of relief is other than a withdrawal motion under this rule. Both of these matters have been the source of considerable confusion under the present rule. In its present form, the rule declares that a motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed, but then states the standard for permitting withdrawal after sentence. In fact, "there is no limitation upon the time within which relief thereunder may, after sentencing, be sought." *United States* v. *Watson*, 548 F.2d 1058 (D.C.Cir. 1977). It has been critically stated that "the Rule offers little guidance as to the applicable standard for a pre-sentence withdrawal of plea," *United States* v. *Michaelson*, 552 F.2d 472 (2d Cir. 1977), and that as a result "the contours of [the presentence] standard are not easily defined." *Bruce* v. *United States*, 379 F.2d 113 (D.C.Cir. 1967).

By replacing the "manifest injustice" standard with a requirement that, in cases to which it applied, the defendant must (unless taking a direct appeal) proceed under 28 U.S.C. § 2255, the amendment avoids language which has been a cause of unnecessary confusion. Under the amendment, a defendant who proceeds too late to come under the more generous "fair and just reason" standard must seek relief under § 2255, meaning the applicable standard is that stated in *Hill* v. *United States*, 368 U.S. 424 (1962): "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure."

Some authority is to be found to the effect that the rule 32(d) "manifest injustice" standard is indistinguishable from the § 2255 standard. In *United States* v. *Hamilton*, 553 F.2d 63 (10th Cir. 1977), for example, the court, after first concluding defendant was not entitled to relief under the § 2255 "miscarriage of justice" test, then held that "[n]othing is to be gained by the invocation of Rule 32(d)" and its "manifest injustice" standard. Some courts, however, have indicated that the rule 32(d) standard provides a somewhat broader basis for relief than § 2255. *United States* v. *Dabdoub-Diaz*, 599 F.2d 96 (5th Cir. 1979); *United States* v. *Watson*, 548 F.2d 1058 (D.C.Cir. 1977); *Meyer* v. *United States*, 424 F.2d 1181 (8th Cir.1970); *United States* v. *Kent*, 397 F.2d 446 (7th Cir. 1968). It is noteworthy, however, that in *Dabdoub-Diaz*, *Meyer* and *Kent* the defendant did not prevail under either § 2255 or Rule 32(d), and that in *Watson*, though the § 2255 case was remanded for consideration as a 32(d) motion, defendant's complaint (that he was not advised of the special parole term, though the sentence he received did not exceed that he was warned about by the court) was one as to which relief had been denied even upon direct appeal from the conviction. *United States* v. *Peters*, No. 77-1700 (4th Cir. Dec. 22, 1978).

Indeed, it may more generally be said that the results in § 2255 and 32(d) guilty plea cases have been for the most part the same. Relief has often been granted or recognized as available via either of these routes for essentially the same reasons: that there exists a complete constitutional bar to conviction on the offense charged, *Brooks* v. *United States*, 424 F.2d 425 (5th Cir. 1970) (§ 2255), *United States* v. *Bluso*, 519 F.2d 473 (4th Cir. 1975) (Rule 32); that the defendant was incompetent at the time of his plea, *United States* v. *Masthers*, 539 F.2d 721 (D.C.Cir. 1976) (§ 2255), *Kienlen* v. *United States*, 379 F.2d 20 (10th Cir. 1967) (Rule 32); and that the bargain the prosecutor made with defendant was not kept, *Walters* v. *Harris*, 460 F.2d 988 (4th Cir. 1972) (§ 2255), *United States* v. *Hawthorne*, 502 F.2d 1183 (3rd Cir. 1974) (Rule 32). Perhaps even more significant is the fact that relief has often been denied under like circumstances whichever of the two procedures was used: a mere technical violation of Rule 11, *United States* v. *Timmreck*, 441 U.S. 780 (1979) (§ 2255), *United States* v. *Saft*, 558 F.2d 1073 (2d Cir. 1977) (Rule 32); the mere fact defendants expected a lower sentence, *United States* v. *White*, 572 F.2d 1007 (4th Cir. 1978) (§ 2255), *Masciola* v. *United States*, 469 F.2d 1057 (3rd Cir. 1972) (Rule 32); or mere familial coercion, *Wojtowicz* v. *United States*, 550 F.2d 786 (2d Cir. 1977) (§ 2255), *United States* v. *Bartoli*, 572 F.2d 188 (8th Cir. 1978) (Rule 32).

The one clear instance in which a Rule 32(d) attack might prevail when a § 2255 challenge would not is present in those circuits which have reached the questionable result that post-sentence relief under 32(d) is available not merely upon a showing of a "manifest injustice" but also for any deviation from literal compliance with Rule 11. *United States* v. *Cantor*, 469 F.2d 435 (3d Cir. 1972). See Advisory Committee Note to Rule 11(h), noting the unsoundness of that position.

The change in Rule 32(d), therefore, is at best a minor one in terms of how post-sentence motions to withdraw pleas will be decided. It avoids the confusion which now obtains as to whether a § 2255 petition must be assumed to also be a 32(d) motion and, if so, whether this bears significantly upon how the matter should be decided. See, e.g., *United States* v. *Watson*, supra. It also avoids the present undesirable situation in which the mere selection of one of two highly similar avenues of relief, rule

32(d) or § 2255, may have significant procedural consequences, such as whether the government can take an appeal from the district court's adverse ruling (possible under § 2255 only). Moreover, because § 2255 and Rule 32(d) are properly characterized as the "two principal procedures for collateral attack of a federal plea conviction," Borman, *The Hidden Right to Direct Appeal From a Federal Conviction*, 64 Cornell L.Rev. 319, 327 (1979), this amendment is also in keeping with the proposition underlying the Supreme Court's decision in *United States* v. *Timmreck* supra, namely, that "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." The amendment is likewise consistent with ALI Code of Pre-Arraignment Procedure § 350.9 (1975) ("Allegations of noncompliance with the procedures provided in Article 350 shall not be a basis for review of a conviction after the appeal period for such conviction has expired, unless such review is required by the Constitution of the United States or of this State or otherwise by the law of this State other than Article 350"); ABA Standards Relating to the Administration of Criminal Justice § 14–2.1 (2d ed. 1978) (using "manifest injustice" standard, but listing six specific illustrations each of which would be basis for relief under § 2255); Unif.R. Crim.P. 444(e) (Approved Draft, 1974) (Using "interest of justice" test, but listing five specific illustrations each of which would be basis for relief under § 2255).

The first sentence of the amended rule incorporates the "fair and just" standard which the federal courts, relying upon dictum in *Kercheval* v. *United States*, 274 U.S. 220 (1927), have consistently applied to presentence motions. See, e.g., *United States* v. *Strauss*, 563 F.2d 127 (4th Cir. 1977); *United States* v. *Bradin*, 535 F.2d 1039 (8th Cir. 1976); *United States* v. *Barker*, 514 F.2d 208 (D.C.Cir. 1975). Under the rule as amended, it is made clear that the defendant has the burden of showing a "fair and just" reason for withdrawal of the plea. This is consistent with the prevailing view, which is that "the defendant has the burden of satisfying the trial judge that there are valid grounds for withdrawal," see *United States* v. *Michaelson*, supra, and cases cited therein. (Illustrative of a reason which would meet this test but would likely fall short of the § 2255 test is where the defendant now wants to pursue a certain defense which he for good reason did not put forward earlier, *United States* v. *Barker*, supra.)

Although "the terms 'fair and just' lack any pretense of scientific exactness," *United States* v. *Barker*, supra, guidelines have emerged in the appellate cases for applying this standard. Whether the movant has asserted his legal innocence is an important factor to be weighed, *United States* v. *Joslin*, 434 F.2d 526 (D.C.Cir. 1970), as is the reason why the defenses were not put forward at the time of original pleading. *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1973). The amount of time which has passed between the plea and the motion must also be taken into account.

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion * * *. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

United States v. *Barker*, supra.

If the defendant establishes such a reason, it is then appropriate to consider whether the government would be prejudiced by withdrawal of the plea. Substantial prejudice may be present for a variety of reasons. See *United States* v. *Jerry*, 487 F.2d 600 (3d Cir.1973) (physical evidence had been discarded); *United States* v. *Vasquez-Velasco*, 471 F.2d 294 (9th Cir. 1973) (death of chief government witness); *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir. 1971) (other defendants with whom defendant had been joined for trial had already been tried in a lengthy trial); *Farnsworth* v. *Sanford*, 115 F.2d 375 (5th Cir. 1940) (prosecution had dismissed 52 witnesses who had come from all over the country and from overseas bases).

There is currently some disparity in the manner in which presentence motions to withdraw a guilty plea are dealt with. Some courts proceed as if any desire to withdraw the plea before sentence is "fair and just" so long as the government fails to establish that it would be prejudiced by the withdrawal. Illustrative is *United States* v. *Savage*, 561 F.2d 554 (4th Cir. 1977), where the defendant pleaded guilty pursuant to a plea agreement that the government would recommend a sentence of 5 years. At the sentencing hearing, the trial judge indicated his unwillingness to follow the government's recommendation, so the defendant moved to withdraw his plea. That motion was denied. On appeal, the court held that there had been no violation of Rule 11, in that refusal to accept the government's recommendation does not constitute a rejection of the plea agreement. But the court then proceeded to hold that absent any showing of prejudice by the government, "the defendant should be allowed to withdraw his plea"; only upon such a showing by the government must the court "weigh the defendant's reasons for seeking to withdraw his plea against the prejudice which the government will suffer." The other view is that there is no occasion to inquire into the matter of prejudice unless the defendant first shows a good reason for being allowed to withdraw his plea. As stated in *United States* v. *Saft*, 558 F.2d 1073 (2d Cir. 1977): "The Government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of a guilty plea, although such prejudice may be considered by the district court in exercising its discretion." The second sentence of the amended rule, by requiring that the defendant show a "fair and just" reason, adopts the *Saft* position and rejects that taken in *Savage*.

The *Savage* position, as later articulated in *United States* v. *Strauss*, supra, is that the "sounder view, supported by both the language of the rule and by the reasons for it, would be to allow withdrawal of the plea prior to sentencing unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." (Quoting 2 C. Wright, Federal Practice and Procedure § 538, at 474–75 (1969). Although that position may once have been sound, this is no longer the case in light of the recent revisions of Rule 11. Rule 11 now provides for the placing of plea agreements on the record, for full inquiry into the voluntariness of the plea, for detailed advice to the defendant concerning his rights and the

consequences of his plea and a determination that the defendant understands these matters, and for a determination of the accuracy of the plea. Given the great care with which pleas are taken under this revised Rule 11, there is no reason to view pleas so taken as merely "tentative," subject to withdrawal before sentence whenever the government cannot establish prejudice.

> Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but "a grave and solemn act," which is "accepted only with care and discernment."

United States v. *Barker*, supra, quoting from *Brady* v. *United States*, 397 U.S. 742 (1970).

The facts of the *Savage* case reflect the wisdom of this position. In *Savage*, the defendant had entered into a plea agreement whereby he agreed to plead guilty in exchange for the government's promise to recommend a sentence of 5 years, which the defendant knew was not binding on the court. Yet, under the approach taken in *Savage*, the defendant remains free to renege on his plea bargain, notwithstanding full compliance therewith by the attorney for the government, if it later appears to him from the presentence report or the comments of the trial judge or any other source that the court will not follow the government's recommendation. Having bargained for a recommendation pursuant to Rule 11(e)(1)(B), the defendant should not be entitled, in effect, to unilaterally convert the plea agreement into a Rule 11(e)(1)(C) type of agreement (i.e., one with a guarantee of a specific sentence which, if not given, permits withdrawal of the plea).

The first sentence of subdivision (d) provides that the motion, to be judged under the more liberal "fair and just reason" test, must have been made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c). The latter of these has been added to the rule to make it clear that the lesser standard also governs prior to the second stage of sentencing when the judge, pursuant to that statute, has committed the defendant to the custody of the Attorney General for study pending final disposition. Several circuits have left this issue open, e.g., *United States* v. *McCoy*, 477 F.2d 550 (5th Cir. 1973); *Callaway* v. *United States*, 367 F.2d 140 (10th Cir. 1966); while some have held that a withdrawal motion filed between tentative and final sentencing should be judged against the presentence standard, *United States* v. *Barker*, 514 F.2d 208 (D.C. Cir. 1975); *United States* v. *Thomas* 415 F.2d 1216 (9th Cir. 1969).

Inclusion of the § 4205(c) situation under the presentence standard is appropriate. As explained in *Barker*:

> Two reasons of policy have been advanced to explain the near-presumption which Rule 32(d) erects against post-sentence withdrawal motions. The first is that post-sentence withdrawal subverts the "stability" of "final judgments." * * * The second reason is that the post-sentence withdrawal motion often constitutes a veiled attack on the judge's sentencing decision; to grant such motions in lenient fashion might
>
> > undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentence process.
>
> * * * Concern for the "stability of final judgments" has little application to withdrawal motions filed between tentative and final sentencing under Section 4208(b) [now 4205(c)]. The point at which a defendant's judgment of conviction becomes "final" for purposes of appeal—weather at tentative or at final sentencing—is wholly within the defendant's discretion. * * * Concern for the integrity of the sentencing process is, however, another matter. The major point, in our view, is that tentative sentencing under Section 4208(b) [now 4205(c)] leaves the defendant ignorant of his final sentence. He will therefore be unlikely to use a withdrawal motion as an oblique attack on the judge's sentencing policy. The relative leniency of the "fair and just" standard is consequently not out of place.

Rule 32.1. Revocation or Modification of Probation

(a) Revocation of Probation.

(1) Preliminary Hearing. Whenever a probationer is held in custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given authority pursuant to 28 U.S.C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation of probation;

(B) an opportunity to appear at the hearing and present evidence in his own behalf;

(C) upon request, the opportunity to question witnesses against him unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of his right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the probationer shall be held for a revocation hearing. The probationer may be released pursuant to Rule 46(c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(2) Revocation Hearing. The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of

probation jurisdiction. The probationer shall be given

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against him;

(C) an opportunity to appear and to present evidence in his own behalf;

(D) the opportunity to question witnesses against him; and

(E) notice of his right to be represented by counsel.

(b) Modification of Probation. A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him.

(Added Apr. 30, 1979, eff. Dec. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 32.1(a)(1). Since *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), and *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), it is clear that a probationer can no longer be denied due process in reliance on the dictum in *Escoe* v. *Zerbst*, 295 U.S. 490, 492 (1935), that probation is an "act of grace." See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 86 (1967).

Subdivision (a)(1) requires, consistent with the holding in *Scarpelli*, that a prompt preliminary hearing must be held whenever "a probationer is held in custody on the ground that he has violated a condition of his probation." See 18 U.S.C. § 3653 regarding arrest of the probationer with or without a warrant. If there is to be a revocation hearing but there has not been a holding in custody for a probation violation, there need not be a preliminary hearing. It was the fact of such a holding in custody "which prompted the Court to determine that a preliminary as well as a final revocation hearing was required to afford the petitioner due process of law," *United States* v. *Tucker*, 524 F.2d 77 (5th Cir. 1975). Consequently, a preliminary hearing need not be held if the probationer was at large and was not arrested but was allowed to appear voluntarily, *United States* v. *Strada*, 503 F.2d 1081 (8th Cir. 1974), or in response to a show cause order which "merely requires his appearance in court," *United States* v. *Langford*, 369 F.Supp. 1107 (N.D.Ill.1973); if the probationer was in custody pursuant to a new charge, *Thomas* v. *United States*, 391 F.Supp. 202 (W.D.Pa.1975), or pursuant to a final conviction of a subsequent offense, *United States* v. *Tucker*, supra; or if he was arrested but obtained his release.

Subdivision (a)(1)(A), (B) and (C) list the requirements for the preliminary hearing, as developed in *Morrissey* and made applicable to probation revocation cases in *Scarpelli*. Under (A), the probationer is to be given notice of the hearing and its purpose and of the alleged violation of probation. "Although the allegations in a motion to revoke probation need not be as specific as an indictment, they must be sufficient to apprise the probationer of the conditions of his probation which he is alleged to have violated, as well as the dates and events which support the charge." *Kartman* v. *Parratt*, 397 F.Supp. 531 (D.Nebr.1975). Under (B), the probationer is permitted to appear and present evidence in his own behalf. And under (C), *upon request* by the probationer, adverse witnesses shall be made available for questioning unless the magistrate determines that the informant would be subjected to risk of harm if his identity were disclosed.

Subdivision (a)(1)(D) provides for notice to the probationer of his right to be represented by counsel at the preliminary hearing. Although *Scarpelli* did not impose as a constitutional requirement a right to counsel in all instances, under 18 U.S.C. § 3006A(b) a defendant is entitled to be represented by counsel whenever charged "with a violation of probation."

The federal magistrate (see definition in rule 54(c)) is to keep a record of what transpires at the hearing and, if he finds probable cause of a violation, hold the probationer for a revocation hearing. The probationer may be released pursuant to rule 46(c) pending the revocation hearing.

Rule 32.1(a)(2). Subdivision (a)(2) mandates a final revocation hearing within a reasonable time to determine whether the probationer has, in fact, violated the conditions of his probation and whether his probation should be revoked. Ordinarily this time will be measured from the time of the probable cause finding (if a preliminary hearing was held) or of the issuance of an order to show cause. However, what constitutes a reasonable time must be determined on the facts of the particular case, such as whether the probationer is available or could readily be made available. If the probationer has been convicted of and is incarcerated for a new crime, and that conviction is the basis of the pending revocation proceedings, it would be relevant whether the probationer waived appearance at the revocation hearing.

The hearing required by rule 32.1(a)(2) is not a formal trial; the usual rules of evidence need not be applied. See *Morrissey* v. *Brewer*, supra ("the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial"); Rule 1101(d)(e) of the Federal Rules of Evidence (rules not applicable to proceedings "granting or revoking probation"). Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. *United States* v. *Francischine*, 512 F.2d 827 (5th Cir. 1975). This hearing may be waived by the probationer.

Subdivisions (a)(2)(A)–(E) list the rights to which a probationer is entitled at the final revocation hearing. The final hearing is less a summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause. Thus, the probationer has certain rights not granted at the preliminary hearing: (i) the notice under (A) must be written; (ii) under (B) disclosure of all the evidence against the probationer is required; and (iii) under (D) the probationer does not have to specifically request the right to confront adverse witnesses, and the court may not limit the opportunity to question the witnesses against him.

Under subdivision (a)(2)(E) the probationer must be given notice of his right to be represented by counsel. Although *Scarpelli* holds that the Constitution does not

compel counsel in all probation revocation hearings, under 18 U.S.C. § 3006A(b) a defendant is entitled to be represented by counsel whenever charged "with a violation of probation."

Revocation of probation is proper if the court finds a violation of the conditions of probation and that such violation warrants revocation. Revocation followed by imprisonment is an appropriate disposition if the court finds on the basis of the original offense and the intervening conduct of the probationer that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

See American Bar Association, Standards Relating to Probation § 5.1 (Approved Draft, 1970)

If probation is revoked, the probationer may be required to serve the sentence originally imposed, or any lesser sentence, and if imposition of sentence was suspended he may receive any sentence which might have been imposed. 18 U.S.C. § 3653. When a split sentence is imposed under 18 U.S.C. § 3651 and probation is subsequently revoked, the probationer is entitled to credit for the time served in jail but not for the time he was on probation. *Thomas* v. *United States*, 327 F.2d 795 (10th Cir.), cert. denied 377 U.S. 1000 (1964); *Schley* v. *Peyton*, 280 F.Supp. 307 (W.D.Va.1968).

Rule 32.1(b). Subdivision (b) concerns proceedings on modification of probation (as provided for in 18 U.S.C. § 3651). The probationer should have the right to apply to the sentencing court for a clarification or change of conditions. American Bar Association, Standards Relating to Probation § 3.1(c) (Approved Draft, 1970). This avenue is important for two reasons: (1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification.

Probation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation. See generally ABA Standards, supra, § 3.3. The sentencing court is given the authority to shorten the term or end probation early upon its own motion without a hearing. And while the modification of probation is a part of the sentencing procedure, so that the probationer is ordinarily entitled to a hearing and presence of counsel, a modification favorable to the probationer may be accomplished without a hearing in the presence of defendant and counsel. *United States* v. *Bailey*, 343 F.Supp. 76 (W.D.Mo.1971).

Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years; and for motions for new trial on other grounds from three to five days. Otherwise, it substantially continues existing practice. See Rule II of the Criminal Appeals Rules of 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688]. Cf. Rule 59(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

1966 AMENDMENT

The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion. See *United States* v. *Smith*, 331 U.S. 469 (1947). These amendments do not, of course, change the power which the court has in certain circumstances, prior to verdict or finding of guilty, to declare a mistrial and order a new trial on its own motion. See e.g., *Gori* v. *United States*, 367 U.S. 364 (1961); *Downum* v. *United States*, 372 U.S. 734 (1963); *United States* v. *Tateo*, 377 U.S. 463 (1964). The amendment to the last sentence changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

Rule 34. Arrest of Judgment

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule continues existing law except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See Rule II(2) of Criminal Appeals Rules of 1933, 292 U.S.C. 661 [18 U.S.C. formerly following § 688].

1966 AMENDMENT

The words "on motion of a defendant" are added to make clear here, as in Rule 33, that the court may act only pursuant to a timely motion by the defendant.

The amendment to the second sentence is designed to clarify an ambiguity in the rule as originally drafted. In *Lott* v. *United States*, 367 U.S. 421 (1961) the Supreme Court held that when a defendant pleaded nolo contendere the time in which a motion could be made under this rule did not begin to run until entry of the judgment.

The Court held that such a plea was not a "determination of guilty." No reason of policy appears to justify having the time for making this motion commence with the verdict or finding of guilt but not with the acceptance of the plea of nolo contendere or the plea of guilty. The amendment changes the result in the *Lott* case and makes the periods uniform. The amendment also changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

Rule 35. Correction or Reduction of Sentence

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983.)

Amendment of Rule

Pub.L. 98-473, Title II, §§ 215(b), 235, Oct. 12, 1984, 98 Stat. 2015, 2031, provided that, effective on Nov. 1, 1986, this rule is amended to read as follows:

"Rule 35. Correction of Sentence

"(a) Correction of a Sentence on Remand. The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

"(1) for imposition of a sentence in accord with the findings of the court of appeals; or

"(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

"(b) Correction of Sentence for Changed Circumstances. The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).".

NOTES OF ADVISORY COMMITTEE ON RULES

The first sentence of the rule continues existing law. The second sentence introduces a flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court. Rule 45(c) abolishes the expiration of a term of court as a time limitation, thereby necessitating the introduction of a specific time limitation as to all proceedings now governed by the term of court as a limitation. The Federal Rules of Civil Procedure (Rule 6(c)), 28 U.S.C. Appendix, abolishes the term of court as a time limitation in respect to civil actions. The two rules together thus do away with the significance of the expiration of a term of court which has largely become an anachronism.

1966 AMENDMENT

The amendment to the first sentence gives the court power to correct a sentence imposed in an illegal manner within the same time limits as those provided for reducing a sentence. In *Hill* v. *United States*, 368 U.S. 424 (1962) the court held that a motion to correct an illegal sentence was not an appropriate way for a defendant to raise the question whether when he appeared for sentencing the court had afforded him an opportunity to make a statement in his own behalf as required by Rule 32(a). The amendment recognizes the distinction between an illegal sentence, which may be corrected at any time, and a sentence imposed in an illegal manner, and provides a limited time for correcting the latter.

The second sentence has been amended to increase the time within which the court may act from 60 days to 120 days. The 60-day period is frequently too short to enable the defendant to obtain and file the evidence, information and argument to support a reduction in sentence. Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel may result in the 60-day period passing before the court is able to consider the case.

The other amendments to the second sentence clarify ambiguities in the timing provisions. In those cases in which the mandate of the court of appeals is issued prior to action by the Supreme Court on the defendant's petition for certiorari, the rule created problems in three situations: (1) If the writ were denied, the last phrase of the rule left obscure the point at which the period began to run because orders of the Supreme Court denying applications for writs are not sent to the district courts. See *Johnson* v. *United States*, 235 F.2d 459 (5th Cir. 1956). (2) If the writ were granted but later dismissed as improvidently granted, the rule did not provide any time period for reduction of sentence. (3) If the writ were granted and later the Court affirmed a judgment of the court of appeals which had affirmed the conviction, the rule did not provide any time period for reduction of sentence. The amendment makes it clear that in each of these three situations the 120-period commences to run with the entry of the order or judgment of the Supreme Court.

The third sentence has been added to make it clear that the time limitation imposed by Rule 35 upon the reduction of a sentence does not apply to such reduction upon the revocation of probation as authorized by 18 U.S.C. § 3653.

1979 AMENDMENT

Rule 35 is amended in order to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law. See *United States* v. *Murray*, 275 U.S. 347 (1928) (Probation Act construed not to give power to district court to grant probation to convict after beginning of service of sentence, even in the same term of court); *Affronti* v. *United States*, 350 U.S. 79 (1955) (Probation Act construed to mean that after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, the district court may not suspend sentence and grant probation as to the remaining term or terms). In construing the statute in *Murray* and *Affronti*, the Court concluded Congress could not have intended to make the probation provisions applicable during the *entire* period of incarceration (the only other conceivable interpretation of the statute), for this would result in undue duplication of the three methods of mitigating a sentence—probation, pardon and parole—and would impose upon district judges the added burden of responding to probation applications from prisoners throughout the service of their terms of imprisonment. Those concerns do not apply to the instant provisions, for the reduction may occur only within the time specified in subdivision (b). This change gives "meaningful effect" to the motion-to-reduce remedy by allowing the court "to consider all alternatives that were available at the time of imposition of the original sentence." *United States* v. *Golphin*, 362 F.Supp. 698 (W.D. Pa. 1973).

Should the reduction to a sentence of probation occur after the defendant has been incarcerated more than six months, this would put into issue the applicability of 18 U.S.C. § 3651, which provides that initially the court "may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best."

1983 AMENDMENT

Rule 35(b)

There is currently a split of authority on the question of whether a court may reduce a sentence within 120 days after revocation of probation when the sentence was imposed earlier but execution of the sentence had in the interim been suspended in part or in its entirety. Compare *United States* v. *Colvin*, 644 F.2d 703 (8th Cir. 1981) (yes); *United States* v. *Johnson*, 634 F.2d 94 (3d Cir. 1980) (yes); with *United States* v. *Rice*, 671 F.2d 455 (11th Cir. 1982) (no); *United States* v. *Kahane*, 527 F.2d 491 (2d Cir. 1975) (no). The Advisory Committee believes that the rule should be clarified in light of this split, and has concluded that as a policy matter the result reached in *Johnson* is preferable.

The Supreme Court declared in *Korematsu* v. *United States*, 319 U.S. 432, 435 (1943), that "the difference to the probationer between imposition of sentence followed by probation ... and suspension of the imposition of sentence [followed by probation]" is not a meaningful one. When imposition of sentence is suspended entirely at the time a defendant is placed on probation, that defendant has 120 days after revocation of probation and imposition of sentence to petition for leniency. The amendment to subdivision (b) makes it clear that similar treatment is to be afforded probationers for whom execution, rather than imposition, of sentence was originally suspended.

The change facilitates the underlying objective of rule 35, which is to "give every convicted defendant a second round before the sentencing judge, and [afford] the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim." *United States* v. *Ellenbogan*, 390 F.2d 537, 543 (2d Cir. 1968). It is only technically correct that a reduction may be sought when a suspended sentence is imposed. As noted in *Johnson*, supra, at 96:

> It frequently will be unrealistic for a defendant whose sentence has just been suspended to petition the court for the further relief of a reduction of that suspended sentence.
>
> Just as significant, we doubt that sentencing judges would be very receptive to Rule 35 motions proffered at the time the execution of a term of imprisonment is suspended in whole or in part and the defendant given a term of probation. Moreover, the sentencing judge cannot know of events that might occur later and that might bear on what would constitute an appropriate term of imprisonment should the defendant violate his probation.... In particular, it is only with the revocation hearing that the judge is in a position to consider whether a sentence originally suspended pending probation should be reduced. The revocation hearing is thus the first point at which an offender can be afforded a realistic opportunity to plead for a light sentence. If the offender is to be provided two chances with the sentencing judge, to be meaningful this second sentence must occur subsequent to the revocation hearing.

Rule 36. Clerical Mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule continues existing law. *Rupinski* v. *United States*, 4 F.2d 17, C.C.A.6th. The rule is similar to Rule 60(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

VIII. APPEAL (Abrogated Dec. 4, 1967, eff. July 1, 1968)

[Rule 37. Taking Appeal; and Petition for Writ of Certiorari.] (Abrogated Dec. 4, 1967, Eff. July 1, 1968)

NOTES OF ADVISORY COMMITTEE ON RULES

These are the criminal rules [Rules 37, 38(b), (c), 39] relating to appeals, the provisions of which are transferred to and covered by the Federal Rules of Appellate Procedure and (in the case of Rule 37(b) and (c), taking appeal to the Supreme Court and petition for review on writ of certiorari, respectively) by the Rules of the Supreme Court.

Rule 38. Stay of Execution, and Relief Pending Review

(a) Stay of Execution.

(1) Death. A sentence of death shall be stayed if an appeal is taken.

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of appeal pursuant to Rule 9(b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

(3) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(4) Probation. An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.

[(b) Bail.] (Abrogated Dec. 4, 1967, eff. July 1, 1968)

[(c) Application for Relief Pending Review.] (Abrogated Dec. 4, 1967, eff. July 1, 1968)

(As amended Dec. 27, 1948, eff. Jan. 1, 1949; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Apr. 24, 1972, eff. Oct. 1, 1972.)

Amendment of Rule

Pub.L. 98-473, Title II, §§ 215(c), 235, Oct. 12, 1984, 98 Stat. 2016, 2031, provided that, effective on Nov. 1, 1986, this rule is amended:

(1) by amending the caption to read: "Stay of Execution" and deleting "(a) Stay of Execution.";

(2) by deleting subdivisions (b) and (c);

(3) by redesignating subdivisions (a)(1) through (a)(4) as subdivisions (a) through (d), respectively;

(4) in subdivision (a), by adding "from the conviction or sentence" after "is taken";

(5) in the first sentence of subdivision (b), by adding "from the conviction or sentence" after "is taken";

(6) by amending subdivision (d) to read as follows:

*"(d) **Probation.** A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay."; and*

(7) by adding new subdivisions (e) and (f) as follows:

*"(e) **Criminal Forfeiture, Notice to Victims, and Restitution.** A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.*

*"(f) **Disabilities.** A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.".*

References in Text. The Federal Rules of Appellate Procedure, referred to in subsec. (a)(2), are set out in this pamphlet.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule substantially continues existing law except that it provides that in case an appeal is taken from a judgment imposing a sentence of imprisonment, a stay shall be granted only if the defendant so elects, or is admitted to bail. Under the present rule the sentence is automatically stayed unless the defendant elects to commence service of the sentence pending appeal. The new rule merely changes the burden of making the election. See Rule V of the Criminal Appeals Rules, 1933, 292 U.S. 661 [18 U.S.C. formerly following § 688].

1966 AMENDMENT

A defendant sentenced to a term of imprisonment is committed to the custody of the Attorney General who is empowered by statute to designate the place of his confinement. 18 U.S.C. § 4082. The sentencing court has no authority to designate the place of imprisonment. See, e.g., *Hogue* v. *United States*, 287 F.2d 99 (5th Cir. 1961), cert. den., 368 U.S. 932 (1961).

When the place of imprisonment has been designated, and notwithstanding the pendency of an appeal, the defendant is usually transferred from the place of his temporary detention within the district of his conviction unless he has elected "not to commence service of the sentence." This transfer can be avoided only if the defendant makes the election, a course sometimes advised by counsel who may deem it necessary to consult with the defendant from time to time before the appeal is finally perfected. However, the election deprives the defendant of a right to claim credit for the time spent in jail pending the disposition of the appeal because 18 U.S.C. § 3568 provides that the sentence of imprisonment commences, to run only from "the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence." See, e.g., *Shelton* v. *United States*, 234 F.2d 132 (5th Cir. 1956).

The amendment eliminates the procedure for election not to commence service of sentence. In lieu thereof it is provided that the court may recommend to the Attorney General that the defendant be retained at or transferred to a place of confinement near the place of trial or the place where the appeal is to be heard for the period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals. Under this procedure the defendant would no longer be required to serve dead time in a local jail in order to assist in preparation of his appeal.

1968 AMENDMENT

Subdivisions (b) and (c) of this rule relate to appeals, the provisions of which are transferred to and covered by the Federal Rules of Appellate Procedure. See Advisory Committee Note under rule 37.

1972 AMENDMENT

Rule 38(a)(2) is amended to reflect rule 9(b), Federal Rules of Appellate Procedure. The criteria for the stay of a sentence of imprisonment pending disposition of an appeal are those specified in rule 9(c) which incorporates 18 U.S.C. § 3148 by reference.

The last sentence of subdivision (a)(2) is retained although easy access to the defendant has become less important with the passage of the Criminal Justice Act which provides for compensation to the attorney to travel to the place at which the defendant is confined. Whether the court will recommend confinement near the place of trial or place where the appeal is to be heard will depend upon a balancing of convenience against the possible advantage of confinement at a more remote correctional institution where facilities and program may be more adequate.

The amendment to subdivision (a)(4) gives the court discretion in deciding whether to stay the order placing the defendant on probation. It also makes mandatory the fixing of conditions for the stay if a stay is granted. The court cannot release the defendant pending appeal without either placing him on probation or fixing the conditions for the stay under the Bail Reform Act, 18 U.S.C. § 3148.

Former rule 38(a)(4) makes mandatory a stay of an order placing the defendant on probation whenever an appeal is noted. The court may or may not impose conditions upon the stay. See rule 46, Federal Rules of Criminal Procedure; and the Bail Reform Act, 18 U.S.C. § 3148.

Having the defendant on probation during the period of appeal may serve the objectives of both community protection and defendant rehabilitation. In current practice, the order of probation is sometimes stayed for an appeal period as long as two years. In a situation where the appeal is unsuccessful, the defendant must start under probation supervision after so long a time that the conditions of probation imposed at the time of initial sentencing may no longer appropriately relate either to the defendant's need for rehabilitation or to the community's need for protection. The purposes of probation are more likely to be served if the judge can exercise discretion, in appropriate cases, to require the defendant to be under probation during the period of appeal. The American Bar Association Project on Standards for Criminal Justice takes the position that prompt imposition of sentence aids in the rehabilitation of defendants, ABA Standards Relating to Pleas of Guilty § 1.8(a)(i), Commentary p. 40 (Approved Draft, 1968). See also Sutherland and Cressey, Principles of Criminology 336 (1966).

Under 18 U.S.C. § 3148 the court now has discretion to impose conditions of release which are necessary to protect the community against danger from the defendant. This is in contrast to release prior to conviction, where the only appropriate criterion is insuring the appearance of the defendant. 18 U.S.C. § 3146. Because the court may impose conditions of release to insure community protection, it seems appropriate to enable the court to do so by ordering the defendant to submit to probation supervision during the period of appeal, thus giving the probation service responsibility for supervision.

A major difference between probation and release under 18 U.S.C. § 3148 exists if the defendant violates the conditions imposed upon his release. In the event that release is under 18 U.S.C. § 3148, the violation of the condition may result in his being placed in custody pending the decision on appeal. If the appeal were unsuccessful, the order placing him on probation presumably would become effective at that time, and he would then be released under probation supervision. If the defendant were placed on probation, his violation of a condition could result in the imposition of a jail or prison sentence. If the appeal were unsuccessful, the jail or prison sentence would continue to be served.

[Rule 39. Supervision of Appeal.] (Abrogated Dec. 4, 1967, Eff. July 1, 1968)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule relating to appeals is abrogated since the provisions of the rule are transferred to and covered by the Federal Rules of Appellate Procedure. See Advisory Committee Note under rule 37.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Commitment to Another District

(a) Appearance Before Federal Magistrate. If a person is arrested in a district other than that in which the offense is alleged to have been committed, he shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that he is the person named in the indictment, information or warrant. If the defendant is held to answer, he shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof.

(b) Statement by Federal Magistrate. In addition to the statements required by Rule 5, the federal magistrate shall inform the defendant of the provisions of Rule 20.

(c) Papers. If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(d) Arrest of Probationer. If a person is arrested for a violation of his probation in a district other than the district having probation jurisdiction, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed under Rule 32.1 if jurisdiction over the probationer is transferred to that district pursuant to 18 U.S.C. § 3653;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the probationer to answer in the district court of the district having probation jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the probationer held to answer in the district court of the district having probation jurisdiction upon production of certified copies of the probation order, the warrant, and the application for the warrant, and upon a finding that the person before him is the person named in the warrant.

(e) Arrest for Failure to Appear. If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of his release, the person arrested shall be taken without unnecessary delay before the nearest available federal magistrate. Upon production of the warrant or a certified copy thereof and upon a finding that the person before him is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

(f) Release or Detention. If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the Federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the Federal magistrate amends the release or detention decision or alters the conditions of release, he shall set forth the reasons for his action in writing.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Aug. 1, 1979; July 31, 1979, Pub.L. 96–42, § 1(2), 93 Stat. 326; Apr. 28, 1982, eff. Aug. 1, 1982; Oct. 12, 1984, Pub.L. 98–473, Title II, § 209(c), 98 Stat. 1986.)

Amendment of Subsec. (d)(1)

Pub.L. 98–473, Title II, §§ 215(d), 235, Oct. 12, 1984, 98 Stat. 2016, 2031, provided that, effective on Nov. 1, 1986, this rule is amended by deleting "3653" in subdivision (d)(1) and inserting in lieu thereof "3605".

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule modifies and revamps existing procedure. The present practice has developed as a result of a series of judicial decisions, the only statute dealing with the

subject being exceedingly general, 18 U.S.C. former § 591 (now § 3041) (Arrest and removal for trial):

For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. * * * Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The scope of a removal hearing, the issues to be considered, and other similar matters are governed by judicial decisions, *Beavers* v. *Henkel*, 194 U.S. 73, 24 S.Ct. 605, 48 L.Ed. 882; *Tinsley* v. *Treat*, 205 U.S. 20, 27 S.Ct. 430, 51 L.Ed. 689; *Henry* v. *Henkel*, 235 U.S. 219; *Rodman* v. *Pothier*, 264 U.S. 399, 44 S.Ct. 360, 68 L.Ed. 759; *Morse* v. *United States*, 267 U.S. 80, 45 S.Ct. 209, 69 L.Ed. 522; *Fetters* v. *United States ex rel. Cunningham*, 283 U.S. 638, 51 S.Ct. 596, 75 L.Ed. 1321; *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 55 S.Ct. 781, 79 L.Ed. 1501; see, also, 9 Edmunds, Cyclopedia of Federal Procedure 3905, et seq.

2. The purpose of removal proceedings is to accord safeguards to a defendant against an improvident removal to a distant point for trial. On the other hand, experience has shown that removal proceedings have at times been used by defendants for dilatory purposes and in attempting to frustrate prosecution by preventing or postponing transportation even as between adjoining districts and between places a few miles apart. The object of the rule is adequately to meet each of these two situations.

3. For the purposes of removal, all cases in which the accused is apprehended in a district other than that in which the prosecution is pending have been divided into two groups: first, those in which the place of arrest is either in another district of the same State, or if in another State, then less than 100 miles from the place where the prosecution is pending; and second, cases in which the arrest occurs in a State other than that in which the prosecution is pending and the place of arrest is 100 miles or more distant from the latter place.

In the first group of cases, removal proceedings are abolished. The defendant's right to the usual preliminary hearing is, of course, preserved, but the committing magistrate, if he holds defendant would bind him over to the district court in which the prosecution is pending. As ordinarily there are no removal proceedings in State prosecutions as between different parts of the same State, but the accused is transported by virtue of the process under which he was arrested, it seems reasonable that no removal proceedings should be required in the Federal courts as between districts in the same State. The provision as to arrest in another State but at a place less than 100 miles from the place where the prosecution is pending was added in order to preclude obstruction against bringing the defendant a short distance for trial.

In the second group of cases mentioned in the first paragraph, removal proceedings are continued. The practice to be followed in removal hearings will depend on whether the demand for removal is based upon an indictment or upon an information or complaint. In the latter case, proof of identity and proof of reasonable cause to believe the defendant guilty will have to be adduced in order to justify the issuance of a warrant of removal. In the former case, proof of identity coupled with a certified copy of the indictment will be sufficient, as the indictment will be conclusive proof of probable cause. The distinction is based on the fact that in case of an indictment, the grand jury, which is an arm of the court, has already found probable cause. Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district.

4. For discussions of this rule see, Homer Cummings, 29 A.B.A.Jour. 654, 656; Holtzoff, 3 F.R.D. 445, 450–452; Holtzoff, 12 George Washington L.R. 119, 127–130; Holtzoff, The Federal Bar Journal, October 1944, 18–37; Berge, 42 Mich.L.R. 353, 374; Medalie, 4 Lawyers Guild R. (3)1, 4.

Note to Subdivision (b). The rule provides that all removal hearings shall take place before a United States commissioner or a Federal judge. It does not confer such jurisdiction on State or local magistrates. While theoretically under existing law State and local magistrates have authority to conduct removal hearings, nevertheless as a matter of universal practice, such proceedings are always conducted before a United States commissioner or a Federal judge, 9 Edmunds, Cyclopedia of Federal Procedure 3919.

1966 AMENDMENT

The amendment conforms to the change made in the corresponding procedure in Rule 5(b).

1972 AMENDMENT

Subdivision (a) is amended to make clear that the person shall be taken before the federal magistrate "without unnecessary delay." Although the former rule was silent in this regard, it probably would have been interpreted to require prompt appearance, and there is therefore advantage in making this explicit in the rule itself. See C. Wright, Federal Practice and Procedure: Criminal § 652 (1969, Supp. 1971). Subdivision (a) is amended to also make clear that the person is to be brought before a "federal magistrate" rather than a state or local magistrate authorized by 18 U.S.C. § 3041. The former rules were inconsistent in this regard. Although rule 40(a) provided that the person may be brought before a state or local officer authorized by former rule 5(a), such state or local officer lacks authority to conduct a preliminary examination under rule 5(c), and a principal purpose of the appearance is to hold a preliminary examination where no prior indictment or information has issued. The Federal Magistrates Act should make it possible to bring a person before a federal magistrate. See C. Wright,

Federal Practice and Procedure: Criminal § 653, especially n.35 (1969, Supp. 1971).

Subdivision (b)(2) is amended to provide that the federal magistrate should inform the defendant of the fact that he may avail himself of the provisions of rule 20 if applicable in the particular case. However, the failure to so notify the defendant should not invalidate the removal procedure. Although the old rule is silent in this respect, it is current practice to so notify the defendant, and it seems desirable, therefore, to make this explicit in the rule itself.

The requirement that an order of removal under subdivision (b)(3) can be made only by a judge of the United States and cannot be made by a United States magistrate is retained. However, subdivision (b)(5) authorizes issuance of the warrant of removal by a United States magistrate if he is authorized to do so by a rule of district court adopted in accordance with 28 U.S.C. § 636(b):

> Any district court * * * by the concurrence of a majority of all the judges * * * may establish rules pursuant to which any full-time United States magistrate * * * may be assigned * * * such additional duties as are not inconsistent with the Constitution and laws of the United States.

Although former rule 40(b)(3) required that the warrant of removal be issued by a judge of the United States, there appears no constitutional or statutory prohibition against conferring this authority upon a United States magistrate in accordance with 28 U.S.C. § 636(b). The background history is dealt with in detail in 8A J. Moore, Federal Practice ¶¶ 40.01 and 40.02 (2d ed. Cipes 1970, Supp. 1971).

Subdivision (b)(4) makes explicit reference to provisions of the Bail Reform Act of 1966 by incorporating a cross-reference to 18 U.S.C. § 3146 and § 3148.

1979 AMENDMENT

This substantial revision of rule 40 abolishes the present distinction between arrest in a nearby district and arrest in a distant district, clarifies the authority of the magistrate with respect to the setting of bail where bail had previously been fixed in the other district, adds a provision dealing with arrest of a probationer in a district other than the district of supervision, and adds a provision dealing with arrest of a defendant or witness for failure to appear in another district.

Note to Subdivision (a). Under subdivision (a) of the present rule, if a person is arrested in a nearby district (another district in the same state, or a place less than 100 miles away), the usual rule 5 and 5.1 preliminary proceedings are conducted. But under subdivision (b) of the present rule, if a person is arrested in a distant district, then a hearing leading to a warrant of removal is held. New subdivision (a) would make no distinction between these two situations and would provide for rule 5 and 5.1 proceedings in all instances in which the arrest occurs outside the district where the warrant issues or where the offense is alleged to have been committed.

This abolition of the distinction between arrest in a nearby district and arrest in a distant district rests upon the conclusion that the procedures prescribed in rules 5 and 5.1 are adequate to protect the rights of an arrestee wherever he might be arrested. If the arrest is without a warrant, it is necessary under rule 5 that a complaint be filed forthwith complying with the requirements of rule 4(a) with respect to the showing of probable cause. If the arrest is with a warrant, that warrant will have been issued upon the basis of an indictment or of a complaint or information showing probable cause, pursuant to rules 4(a) and 9(a). Under rule 5.1, dealing with the preliminary examination, the defendant is to be held to answer only upon a showing of probable cause that an offense has been committed and that the defendant committed it.

Under subdivision (a), there are two situations in which no preliminary examination will be held. One is where "an indictment has been returned or an information filed," which pursuant to rule 5(c) obviates the need for a preliminary examination. The other is where "the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending." A defendant might wish to elect that alternative when, for example, the law in that district is that the complainant and other material witnesses may be required to appear at the preliminary examination and give testimony. See *Washington* v. *Clemmer*, 339 F.2d 715 (D.C. Cir. 1964).

New subdivision (a) continues the present requirement that if the arrest was without a warrant a warrant must thereafter issue in the district in which the offense is alleged to have been committed. This will ensure that in the district of anticipated prosecution there will have been a probable cause determination by a magistrate or grand jury.

Note to Subdivision (b). New subdivision (b) follows existing subdivision (b)(2) in requiring the magistrate to inform the defendant of the provisions of rule 20 applicable in the particular case. Failure to so notify the defendant should not invalidate the proceedings.

Note to Subdivision (c). New subdivision (c) follows existing subdivision (b)(4) as to transmittal of papers.

Note to Subdivision (d). New subdivision (d) has no counterpart in the present rule. It provides a procedure for dealing with the situation in which a probationer is arrested in a district other than the district of supervision, consistent with 18 U.S.C. § 3653, which provides in part:

> If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

One possibility, provided for in subdivision (d)(1), is that of transferring jurisdiction over the probationer to the district in which he was arrested. This is permissible under the aforementioned statute, which provides in part:

> Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to

the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

Such transfer may be particularly appropriate when it is found that the probationer has now taken up residence in the district where he was arrested or where the alleged occurrence deemed to constitute a violation of probation took place in the district of arrest. In current practice, probationers arrested in a district other than that of their present supervision are sometimes unnecessarily returned to the district of their supervision, at considerable expense and loss of time, when the more appropriate course of action would have been transfer of probation jurisdiction.

Subdivisions (d)(2) and (3) deal with the situation in which there is not a transfer of probation jurisdiction to the district of arrest. If the alleged probation violation occurred in the district of arrest, then, under subdivision (d)(2), the preliminary hearing provided for in rule 32.-1(a)(1) is to be held in that district. This is consistent with the reasoning in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), made applicable to probation cases in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), where the Court stressed that often a parolee "is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation," and cited this as a factor contributing to the conclusion that due process requires "that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." As later noted in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975):

> In *Morrissey* v. *Brewer*, * * * and *Gagnon* v. *Scarpelli* * * * we held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony. * * * That preliminary hearing, more than the probable cause determination required by the Fourth Amendment, serves the purpose of gathering and preserving live testimony, since the final revocation hearing frequently is held at some distance from the place where the violation occurred.

However, if the alleged violation did not occur in that district, then first-hand testimony concerning the violation is unlikely to be available there, and thus the reasoning of *Morrissey* and *Gerstein* does not call for holding the preliminary hearing in that district. In such a case, as provided in subdivision (d)(3), the probationer should be held to answer in the district court of the district having probation jurisdiction. The purpose of the proceeding there provided for is to ascertain the identity of the probationer and provide him with copies of the warrant and the application for the warrant. A probationer is subject to the reporting condition at all times and is also subject to the continuing power of the court to modify such conditions. He therefore stands subject to return back to the jurisdiction district without the necessity of conducting a hearing in the district of arrest to determine whether there is probable cause to revoke his probation.

Note to Subdivision (e). New subdivision (e) has no counterpart in the present rule. It has been added because some confusion currently exists as to whether present rule 40(b) is applicable to the case in which a bench warrant has issued for the return of a defendant or witness who has absented himself and that person is apprehended in a distant district. In *Bandy* v. *United States*, 408 F.2d 518 (8th Cir. 1969), a defendant, who had been released upon his personal recognizance after conviction and while petitioning for certiorari and who failed to appear as required after certiorari was denied, objected to his later arrest in New York and removal to Leavenworth without compliance with the rule 40 procedures. The court concluded:

> The short answer to Bandy's first argument is found in Rush v. United States, 290 F.2d 709, 710 (5 Cir. 1961): "The provisions of Rules 5 and 40, Federal Rules of Criminal Procedure, 18 U.S.C.A. may not be availed of by a prisoner in escape status * * *." As noted by Holtzoff, "Removal of Defendants in Federal Criminal Procedure", 4 F.R.D. 455, 458 (1946):
>
> "Resort need not be had, however, to this [removal] procedure for the purpose of returning a prisoner who has been recaptured after an escape from custody. It has been pointed out that in such a case the court may summarily direct his return under its general power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law. In fact, in such a situation no judicial process appears necessary. The prisoner may be retaken and administratively returned to the custody from which he escaped."
>
> Bandy's arrest in New York was pursuant to a bench warrant issued by the United States District Court for the District of North Dakota on May 1, 1962, when Bandy failed to surrender himself to commence service of his sentence on the conviction for filing false income tax refunds. As a fugitive from justice, Bandy was not entitled upon apprehension to a removal hearing, and he was properly removed to the United States Penitentiary at Leavenworth, Kansas to commence service of sentence.

Consistent with *Bandy*, new subdivision (e) does not afford such a person all of the protections provided for in subdivision (a). However, subdivision (e) does ensure that a determination of identity will be made before that person is held to answer in the district of arrest.

Note to Subdivision (f). Although the matter of bail is dealt with in rule 46 and 18 U.S.C. §§ 3146 and 3148, new subdivision (f) has been added to clarify the situation in which a defendant makes his initial appearance before the United States magistrate and there is a warrant issued by a judge of a different district who has endorsed the amount of bail on the warrant. The present ambiguity of the rule is creating practical administrative problems. If the United States magistrate concludes that a lower bail is appropriate, the judge who fixed the original bail on the warrant has, on occasion, expressed the view that this is inappropriate conduct by the magistrate. If the magistrate, in such circumstances, does not reduce the bail to

the amount supported by all of the facts, there may be caused unnecessary inconvenience to the defendant, and there would arguably be a violation of at least the spirit of the Bail Reform Act and the Eighth Amendment.

The Procedures Manual for United States Magistrates, issued under the authority of the Judicial Conference of the United States, provides in ch. 6, pp. 8–9:

> Where the arrest occurs in a "distant" district, the rules do not expressly limit the discretion of the magistrate in the setting of conditions of release. However, whether or not the magistrate in the district of arrest has authority to set his own bail under Rule 40, considerations of propriety and comity would dictate that the magistrate should not attempt to set bail in a lower amount than that fixed by a judge in another district. If an unusual situation should arise where it appears from all the information available to the magistrate that the amount of bail endorsed on the warrant is excessive, he should consult with a judge of his own district or with the judge in the other district who fixed the bail in order to resolve any difficulties. (Where an amount of bail is merely recommended on the indictment by the United States attorney, the magistrate has complete discretion in setting conditions of release.)

Rule 40 as amended would encourage the above practice and hopefully would eliminate the present confusion and misunderstanding.

The last sentence of subdivision (f) requires that the magistrate set forth the reasons for his action in writing whenever he fixes bail in an amount different from that previously fixed. Setting forth the reasons for the amount of bail fixed, certainly a sound practice in all circumstances, is particularly appropriate when the bail differs from that previously fixed in another district. The requirement that reasons be set out will ensure that the "considerations of propriety and comity" referred to above will be specifically taken into account.

Pub.L. 96–42, § 1(a), July 31, 1979, 93 Stat. 326, deleted "in accordance with Rule 32.1(a)" from subd. (d)(1), and "in accordance with Rule 32.1(a)(1)" from subd. (d)(2).

1982 AMENDMENT

The amendment to 40(d) is intended to make it clear that the transfer provisions therein apply whenever the arrest occurs other than in the district of probation jurisdiction, and that if probable cause is found at a preliminary hearing held pursuant to Rule 40(d)(2) the probationer should be held to answer in the district having probation jurisdiction.

On occasion, the district of probation supervision and the district of probation jurisdiction will not be the same. See, e.g., *Cupp v. Byington*, 179 F.Supp. 669 (S.D.Ind. 1960) (supervision in Southern District of Indiana, but jurisdiction never transferred from District of Nevada). In such circumstances, it is the district having *jurisdiction* which may revoke the defendant's probation. *Cupp v. Byington, supra*; 18 U.S.C. § 3653 ("the court for the district having jurisdiction over him * * * may revoke the probation"; if probationer goes to another district, "jurisdiction over him may be transferred," and only then does "the court for the district to which jurisdiction is transferred * * * have all the power with respect to the probationer that was previously possessed by the court for the district from which the transfer was made"). That being the case, that is the jurisdiction to which the probationer should be transferred as provided in Rule 40(d).

Because Rule 32.1 has now taken effect, a cross-reference to those provisions has been made in subdivision (d)(1) so as to clarify how the magistrate is to proceed if jurisdiction is transferred.

Rule 41. Search and Seizure

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) Property or Persons Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuance and Contents.

(1) Warrant upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the day-

time, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon Oral Testimony.

(A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) Return of Papers to Clerk. The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Apr. 9, 1956, eff. July 8, 1956; Apr. 24, 1972, eff. Oct. 1, 1972; Mar. 18, 1974, eff. July 1, 1974; Apr. 26, 1976, eff. Aug. 1, 1976; July 30, 1977, Pub.L. 95–78, § 2(e), 91 Stat. 320; Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is a codification of existing law and practice.

Note to Subdivision (a). This rule is a restatement of existing law, 18 U.S.C. former § 611.

Note to Subdivision (b). This rule is a restatement of existing law, 18 U.S.C. former § 612; *Conyer* v. *United States*, 80 F.2d 292, C.C.A.6th. This provision does not supersede or repeal special statutory provisions permitting the issuance of search warrants in specific circumstances. See Subdivision (g) and Note thereto, infra.

Note to Subdivision (c). This rule is a restatement of existing law, 18 U.S.C. former §§ 613–616, 620; *Dumbra* v. *United States*, 268 U.S. 435, 45 S.Ct. 546, 69 L.Ed. 1032.

Note to Subdivision (d). This rule is a restatement of existing law, 18 U.S.C. former §§ 621–624.

Note to Subdivision (e). This rule is a restatement of existing law and practice, with the exception hereafter noted, 18 U.S.C. former §§ 625, 626; *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319; *Agello* v. *United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145; *Gouled* v. *United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647. While under existing law a motion to suppress evidence or to compel return of property obtained by an illegal search and seizure may be made either before a commissioner subject to review by the court on motion, or before the court, the rule provides that such motion may be made only before the court. The purpose is to prevent multiplication of proceedings and to bring the matter before the court in the first instance. While during the life of the Eighteenth Amendment when such motions were numerous it was a common practice in some districts for commissioners to hear such motions, the prevailing practice at the present time is to make such motions before the district court. This practice, which is deemed to be preferable, is embodied in the rule.

Note to Subdivision (f). This rule is a restatement of existing law, 18 U.S.C. former § 627; Cf. Rule 5(c) (last sentence).

Note to Subdivision (g). While Rule 41 supersedes the general provisions of 18 U.S.C. former §§ 611–626 (now 18 U.S.C. §§ 3105, 3109), relating to search warrants, it does not supersede, but preserves, all other statutory provisions permitting searches and seizures in specific situations. Among such statutes are the following:

U.S.C. Title 18 former:
§ 287 [Rule 41] (Search warrant for suspected counterfeiture)
U.S.C. Title 19:
§ 1595 (Customs duties; searches and seizures)
U.S.C. Title 26 former:
§ 3117 [now § 5557] (Officers and agents authorized to investigate, issue search warrants, and prosecute for violations)

For statutes which incorporate by reference 18 U.S.C. former § 98, and therefore are now controlled by this rule, see, e.g.:

U.S.C. Title 18 former:
§ 12 (Subversive activities; undermining loyalty, discipline, or morale of armed forces; searches and seizures)
U.S.C. Title 26 former:
§ 3116 [now § 7302] (Forfeitures and seizures)

Statutory provision for a warrant for detention of war materials seized under certain circumstances is found in 22 U.S.C. § 402 [now § 401] (Seizure of war materials intended for unlawful export.)

Other statutes providing for searches and seizures or entry without warrants are the following:

U.S.C. Title 19:
§ 482 (Search of vehicles and persons)
U.S.C. Title 25 former:
§ 246 [now 18 U.S.C. § 3113] (Searches and seizures)
U.S.C. Title 26 former:
§ 3601 [now § 7606] (Entry of premises for examination of taxable objects)
U.S.C. Title 29:
§ 211 (Investigations, inspections, and records)
U.S.C. Title 49:
§ 781 (Unlawful use of vessels, vehicles, and aircrafts; contraband article defined)
§ 782 (Seizure and forfeiture)
§ 784 (Application of related laws)

1948 AMENDMENT

The amendment is to substitute proper reference to Title 18 in place of the repealed acts.

To eliminate reference to sections of the Act of June 15, 1917, c. 30, which have been repealed by the Act of June 25, 1948, c. 645, which enacted Title 18.

1972 AMENDMENT

Subdivision (a) is amended to provide that a search warrant may be issued only upon the request of a federal law enforcement officer or an attorney for the government. The phrase "federal law enforcement officer" is defined in subdivision (h) in a way which will allow the Attorney General to designate the category of officers who are authorized to make application for a search warrant. The phrase "attorney for the government" is defined in rule 54.

The title to subdivision (b) is changed to make it conform more accurately to the content of the subdivision. Subdivision (b) is also changed to modernize the language used to describe the property which may be seized with a lawfully issued search warrant and to take account of a recent Supreme Court decision (*Warden* v. *Haden*, 387 U.S. 294 (1967)) and recent congressional action (18 U.S.C. § 3103a) which authorize the issuance of a search warrant to search for items of solely evidential value. 18 U.S.C. § 3103a provides that "a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense. . . ."

Recent state legislation authorizes the issuance of a search warrant for evidence of crime. See, *e.g.*, Cal. Penal Code § 1524(4) (West Supp. 1968); Ill. Rev. Stat. ch. 38, § 108–3 (1965); LSA C. Cr. P. art. 161 (1967); N.Y. CPL § 690.10(4) (McKinney, 1971); Ore. Rev. Stat. § 141.010 (1969); Wis. Stat. § 968.13(2) (1969).

The general weight of recent text and law review comment has been in favor of allowing a search for evidence. 8 Wigmore, Evidence § 2184a. (McNaughton rev. 1961); Kamisar. The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn.L.Rev. 891 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif.L.Rev. 474 (1961); Comments: 66 Colum.L.Rev. 355 (1966), 45 N.C.L.Rev. 512 (1967), 20 U.Chi.L.Rev. 319 (1953).

There is no intention to limit the protection of the fifth amendment against compulsory self-incrimination, so items which are solely "testimonial" or "communicative" in nature might well be inadmissible on those grounds. *Schmerber* v. *California*, 384 U.S. 757 (1966). The court referred to the possible fifth amendment limitation in *Warden* v. *Hayden*, *supra:*

This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. [387 U.S. at 303].

See ALI Model Code of Pre-Arraignment Procedure § 551.03(2) and commentary at pp. 3–5 (April 30, 1971).

It seems preferable to allow the fifth amendment limitation to develop as cases arise rather than attempt to articulate the constitutional doctrine as part of the rule itself.

The amendment to subdivision (c) is intended to make clear that a search warrant may properly be based upon a finding of probable cause based upon hearsay. That a search warrant may properly be issued on the basis of hearsay is current law. See, *e.g.*, *Jones* v. *United States*, 362 U.S. 257 (1960); *Spinelli* v. *United States*, 393 U.S. 410 (1969). See also *State* v. *Beal*, 40 Wis.2d 607, 162 N.W.2d 640 (1968), reversing prior Wisconsin cases which held that a search warrant could not properly issue on the basis of hearsay evidence.

The provision in subdivision (c) that the magistrate may examine the affiant or witnesses under oath is intended to assure him an opportunity to make a careful decision as to whether there is probable cause. It seems desirable to do this as an incident to the issuance of the warrant rather than having the issue raised only later on a motion to suppress the evidence. See L. Tiffany, D. McIntyre, and D. Rotenberg, Detection of Crime 118 (1967). If testimony is taken it must be recorded, transcribed, and made part of the affidavit or affidavits. This is to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise.

The requirement that the warrant itself state the grounds for its issuance and the names of any affiants, is eliminated as unnecessary paper work. There is no comparable requirement for an arrest warrant in rule 4. A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.

The former requirement that the warrant require that the search be conducted "forthwith" is changed to read "within a specified period of time not to exceed 10 days." The former rule contained an inconsistency between subdivision (c) requiring that the search be conducted "forthwith" and subdivision (d) requiring execution "within 10 days after its date." The amendment resolves this ambiguity and confers discretion upon the issuing magistrate to specify the time within which the search may be conducted to meet the needs of the particular case.

The rule is also changed to allow the magistrate to authorize a search at a time other than "daytime," where there is "reasonable cause shown" for doing so. To make clear what "daytime" means, the term is defined in subdivision (h).

Subdivision (d) is amended to conform its language to the Federal Magistrates Act. The language "The warrant may be executed and returned only within 10 days after its date" is omitted as unnecessary. The matter is now covered adequately in proposed subdivision (c) which gives the issuing officer authority to fix the time within which the warrant is to be executed.

The amendment to subdivision (e) and the addition of subdivision (f) are intended to require the motion to suppress evidence to be made in the trial court rather than in the district in which the evidence was seized as now allowed by the rule. In *DiBella* v. *United States*, 369 U.S. 121 (1962), the court, in effect, discouraged motions to suppress in the district in which the property was seized:

There is a decision in the Second Circuit, *United States* v. *Klapholz*, 230 F.2d 494 (1956), allowing the Government an appeal from an order granting a post-indictment motion to suppress, apparently for the single reason that the motion was filed in the district of seizure rather than of trial; but the case was soon thereafter taken by a District Court to have counseled declining jurisdiction of such motions for reasons persuasive against allowing the appeal: "This course will avoid a needless duplication of effort by two courts and provide a more expeditious resolution of the controversy besides avoiding the risk of

determining prematurely and inadequately the admissibility of evidence at the trial. . . . A piecemeal adjudication such as that which would necessarily follow from a disposition of the motion here might conceivably result in prejudice either to the Government or the defendants, or both." *United States* v. *Lester*, 21 F.R.D. 30, 31 (D.C.S. D.N.Y. 1957). Rule 41(e), of course, specifically provides for making of the motion in the district of seizure. On a summary hearing, however, the ruling there is likely always to be tentative. We think it accords most satisfactorily with sound administration of the Rules to treat such rulings as interlocutory. [369 U.S. at 132–133.]

As amended, subdivision (e) provides for a return of the property if (1) the person is entitled to lawful possession *and* (2) the seizure was illegal. This means that the judge in the district of seizure does not have to decide the legality of the seizure in cases involving contraband which, even if seized illegally, is not to be returned.

The five grounds for returning the property, presently listed in the rule, are dropped for two reasons—(1) substantive grounds for objecting to illegally obtained evidence *(e.g., Miranda)* are not ordinarily codified in the rules and (2) the categories are not entirely accurate. See *United States* v. *Howard*, 138 F.Supp. 376, 380 (D. Md. 1956).

A sentence is added to subdivision (e) to provide that a motion for return of property, made in the district of trial, shall be treated also as a motion to suppress under rule 12. This change is intended to further the objective of rule 12 which is to have all pretrial motions disposed of in a single court appearance rather than to have a series of pretrial motions made on different dates, causing undue delay in administration.

Subdivision (f) is new and reflects the position that it is best to have the motion to suppress made in the court of the district of trial rather than in the court of the district in which the seizure occurred. The motion to suppress in the district of trial should be made in accordance with the provisions of rule 12.

Subdivision (g) is changed to conform to subdivision (c) which requires the return to be made before a federal judicial officer even though the search warrant may have been issued by a nonfederal magistrate.

Subdivision (h) is former rule 41(g) with the addition of a definition of the term "daytime" and the phrase "federal law enforcement officer."

1977 AMENDMENT

Rule 41(c)(2) is added to establish a procedure for the issuance of a search warrant when it is not reasonably practicable for the person obtaining the warrant to present a written affidavit to a magistrate or a state judge as required by subdivision (c)(1). At least two states have adopted a similar procedure, Ariz.Rev.Stat. Ann. §§ 13–1444(c)–1445(c) (Supp.1973); Cal.Pen.Code §§ 1526(b), 1528(b) (West Supp.1974), and comparable amendments are under consideration in other jurisdictions. See Israel, Legislative Regulation of Searches and Seizures: The Michigan Proposals, 73 Mich.L.Rev. 221, 258–63 (1975); Nakell, Proposed Revisions of North Carolina's Search and Seizure Law, 52 N.Car.L.Rev. 277, 306–11 (1973). It has been strongly recommended that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers." National Advisory Commission on Criminal Justice Standards and Goals, Report on Police 95 (1973). Experience with the procedure has been most favorable. Miller, Telephonic Search Warrants: The San Diego Experience, 9 The Prosecutor 385 (1974).

The trend of recent Supreme Court decisions had been to give greater priority to the use of a search warrant as the proper way of making a lawful search: It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable. . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. *Trupiano* v. *United States*, 334 U.S. 699, 705 (1948), quoted with approval in *Chimel* v. *California*, 395 U.S. 752, 758 (1969). See also *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); Note, *Chambers* v. *Maroney: New Dimensions in the Law of Search and Seizure* 46 Indiana L.J. 257, 262 (1971).

Use of search warrants can best be encouraged by making it administratively feasible to obtain a warrant when one is needed. One reason for the nonuse of the warrant has been the administrative difficulties involved in getting a warrant, particularly at times of the day when a judicial officer is ordinarily unavailable. See L. Tiffany, D. McIntyre, and D. Rotenberg, Detection of Crime 105–116 (1967); LaFave, Improving Police Performance Through the Exclusionary Rule, 30 Mo.L.Rev. 391, 411 (1965). Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently "exigent" to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means. See, e.g., *United States* v. *Johnson*, 523 F.2d 1099 (D.C.Cir. June 16, 1975).

Subdivision (c)(2) provides that a warrant may be issued on the basis of an oral statement of a person not in the physical presence of the federal magistrate. Telephone, radio, or other electronic methods of communication are contemplated. For the warrant to properly issue, four requirements must be met:

(1) The applicant—a federal law enforcement officer or an attorney for the government, as required by subdivision (a)—must persuade the magistrate that the circumstances of time and place make it reasonable to request the magistrate to issue a warrant on the basis of oral testimony. This restriction on the issuance of a warrant recognizes the inherent limitations of an oral warranted procedure, the lack of demeanor evidence, and the lack of a written record for the reviewing magistrate to consider before issuing the warrant. See Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A. Law Review 691, 701 (1974). Circumstances making it reasonable to obtain a warrant on oral testimony exist if delay in obtaining the warrant might result in the destruction or disappearance of the property [see *Chimel* v. *California*, 395 U.S. 752, 773–774 (1969) (White, dissenting); Landynski, The Supreme Court's Search for Fourth Amend-

ment Standards: The Warrantless Search, 45 Conn.B.J. 2, 25 (1971)]; or because of the time when the warrant is sought, the distance from the magistrate of the person seeking the warrant, or both.

(2) The applicant must orally state facts sufficient to satisfy the probable cause requirement for the issuance of the search warrant. (See subdivision (c)(1).) This information may come from either the applicant federal law enforcement officer or the attorney for the government or a witness willing to make an oral statement. The oral testimony must be recorded at this time so that the transcribed affidavit will provide an adequate basis for determining the sufficiency of the evidence if that issue should later arise. See Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv.L.Rev. 825 (1971). It is contemplated that the recording of the oral testimony will be made by a court reporter, by a mechanical recording device, or by a verbatim contemporaneous writing by the magistrate. Recording a telephone conversation is no longer difficult with many easily operated recorders available. See 86:2 L.A. Daily Journal 1 (1973); Miller, Telephonic Search Warrants: The San Diego Experience, 9 The Prosecutor 385, 386 (1974).

(3) The applicant must read the contents of the warrant to the federal magistrate in order to enable the magistrate to know whether the requirements of certainty in the warrant are satisfied. The magistrate may direct that changes be made in the warrant. If the magistrate approves the warrant as requested or as modified by the magistrate, he then issues the warrant by directing the applicant to sign the magistrate's name to the duplicate original warrant. The magistrate then causes to be made a written copy of the approved warrant. This constitutes the original warrant. The magistrate enters the time of issuance of the duplicate original warrant on the face of the original warrant.

(4) Return of the duplicate original warrant and the original warrant must conform to subdivision (d). The transcript of the sworn oral testimony setting forth the grounds for issuance of the warrant must be signed by affiant in the presence of the magistrate and filed with the court.

Because federal magistrates are likely to be accessible through the use of the telephone or other electronic devices, it is unnecessary to authorize state judges to issue warrants under subdivision (c)(2).

Although the procedure set out in subdivision (c)(2) contemplates resort to technology which did not exist when the Fourth Amendment was adopted, the Advisory Committee is of the view that the procedure complies with all of the requirements of the Amendment. The telephonic search warrant process has been upheld as constitutional by the courts, e.g., *People* v. *Peck*, 38 Cal.App.3d 993, 113 Cal.Rptr. 806 (1974), and has consistently been so viewed by commentators. See Israel, Legislative Regulation of Searches and Seizures: The Michigan Proposals, 73 Mich.L.Rev. 221, 260 (1975); Nakell, Proposed Revisions of North Carolina's Search and Seizure Law, 52 N.Car.L.Rev. 277, 310 (1973); Comment, Oral Search Warrants: A New Standard of Warrant Availability, 21 U.C.L.A.Rev. 691, 697 (1973).

Reliance upon oral testimony as a basis for issuing a search warrant is permissible under the Fourth Amendment. *Campbell* v. *Minnesota*, 487 F.2d 1 (8th Cir. 1973); *United States ex rel. Gaugler* v. *Brierley*, 477 F.2d 516 (3d Cir. 1973); *Tabasko* v. *Barton*, 472 F.2d 871 (6th Cir. 1972); *Frazier* v. *Roberts*, 441 F.2d 1224 (8th Cir. 1971). Thus, the procedure authorized under subdivision (c)(2) is not objectionable on the ground that the oral statement is not transcribed in advance of the issuance of the warrant. *People* v. *Peck*, 38 Cal.App.3d 993, 113 Cal.Rptr. 806 (1974). Although it has been questioned whether oral testimony will suffice under the Fourth Amendment if some kind of contemporaneous record is not made of that testimony, see dissent from denial of certiorari in *Christofferson* v. *Washington*, 393 U.S. 1090 (1969), this problem is not present under the procedure set out in subdivision (c)(2).

The Fourth Amendment requires that warrants issue "upon probable cause, supported by Oath or affirmation." The significance of the oath requirement is "that someone must take the responsibility for the facts alleged, giving rise to the probable cause for the issuance of a warrant." *United States ex rel. Pugh* v. *Pate*, 401 F.2d 6 (7th Cir. 1968); See also *Frazier* v. *Roberts*, 441 F.2d 1224 (8th Cir. 1971). This is accomplished under the procedure required by subdivision (c)(2); the need for an oath under the Fourth Amendment does not "require a face to face confrontation between the magistrate and the affiant." *People* v. *Chavaz*, 27 Cal.App.3d 883, 104 Cal.Rptr. 247 (1972). See also *People* v. *Aguirre*, 26 Cal.App.3d 7, 103 Cal.Rptr. 153 (1972), noting it is unnecessary that "oral statements [be] taken in the physical presence of the magistrate."

The availability of the procedure authorized by subdivision (c)(2) will minimize the necessity of federal law enforcement officers engaging in other practices which, at least on occasion, might threaten to a greater extent those values protected by the Fourth Amendment. Although it is permissible for an officer in the field to relay his information by radio or telephone to another officer who has more ready access to a magistrate and who will thus act as the affiant, *Lopez* v. *United States*, 370 F.2d 8 (5th Cir. 1966); *State* v. *Banks*, 250 N.C. 728, 110 S.E.2d 322 (1959), that procedure is less desirable than that permitted under subdivision (c)(2), for it deprives "the magistrate of the opportunity to examine the officer at the scene, who is in a much better position to answer questions relating to probable cause and the requisite scope of the search." Israel, Legislative Regulation of Searches and Seizures: The Michigan Proposals, 73 Mich. L.Rev. 221, 260 (1975). Or, in the absence of the subdivision (c)(2) procedure, officers might take "protective custody" of the premises and occupants for a significant period of time while a search warrant was sought by traditional means. The extent to which the "protective custody" procedure may be employed consistent with the Fourth Amendment is uncertain at best; see Griswold, Criminal Procedure, 1969—Is It a Means or an End?, 29 Md.L.Rev. 307, 317 (1969). The unavailability of the subdivision (c)(2) procedure also makes more tempting an immediate resort to a warrantless search in the hope that the circumstances will later be found to have been sufficiently "exigent" to justify such a step. See Miller, Telephonic Search Warrants: The San Diego Experience,

9 The Prosecutor 385, 386 (1974), noting a dramatic increase in police utilization of the warrant process following enactment of a telephonic warrant statute.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 95–354. AMENDMENTS PROPOSED BY THE SUPREME COURT

The committee agrees with the Supreme Court that it is desirable to encourage Federal law enforcement officers to seek search warrants in situations where they might otherwise conduct warrantless searches by providing for a telephone search warrant procedure with the basic characteristics suggested in the proposed Rule 41(c)(2). As the Supreme Court has observed, "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable. After consideration of the Supreme Court version and a proposal set forth in H.R. 7888, the committee decided to use the language of the House bill as the vehicle, with certain modifications.

A new provision, as indicated in subparagraph (c)(2)(A), is added to establish a procedure for the issuance of a search warrant where the circumstances make it reasonable to dispense with a written affidavit to be presented in person to a magistrate. At least two States have adopted a similar procedure—Arizona and California—and comparable amendments are under consideration in other jurisdictions. Such a procedure has been strongly recommended by the National Advisory Commission on Criminal Justice Standards and Goals and State experience with the procedure has been favorable. The telephone search warrant process has been upheld as constitutional by the courts and has consistently been so viewed by commentators.

In recommending a telephone search warrant procedure, the Advisory Committee note on the Supreme Court proposal points out that the preferred method of conducting a search is with a search warrant. The note indicates that the rationale for the proposed change is to encourage Federal law enforcement officers to seek search warrants in situations when they might otherwise conduct warrantless searches. "Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently 'exigent' to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means."

Subparagraph (c)(2)(B) provides that the person requesting the warrant shall prepare a "duplicate original warrant" which will be read and recorded verbatim by the magistrate on an "original warrant." The magistrate may direct that the warrant be modified.

Subparagraph (c)(2)(C) provides that, if the magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or there is probable cause to believe that they exist, he shall order the issuance of the warrant by directing the requestor to sign the magistrate's name on the duplicate original warrant. The magistrate is required to sign the original warrant and enter the time of issuance thereon. The finding of probable cause may be based on the same type of evidence appropriate for a warrant upon affidavit.

Subparagraph (c)(2)(D) requires the magistrate to place the requestor and any witness under oath and, if a voice recording device is available, to record the proceeding. If a voice recording is not available, the proceeding must be recorded verbatim stenographically or in longhand. Verified copies must be filed with the court as specified.

Subparagraph (c)(2)(E) provides that the contents of the warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

Subparagraph (c)(2)(F) provides that the person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant. Unlike H.R. 7888, this subparagraph does not require the person who executes the warrant to have physical possession of the duplicate original warrant at the time of the execution of the warrant. The committee believes this would make an unwise and unnecessary distinction between execution of regular warrants issued on written affidavits and warrants issued by telephone that would limit the flexibility and utility of this procedure for no useful purpose.

Finally, subparagraph (c)(2)(G) makes it clear that, absent a finding of bad faith by the government, the magistrate's judgment that the circumstances made it reasonable to dispense with a written affidavit—a decision that does not go to the core question of whether there was probable cause to issue a warrant—is not a ground for granting a motion to suppress evidence.

CONGRESSIONAL MODIFICATION OF PROPOSED AMENDMENT

Section 2(e) of Pub.L. 95–78 provided in part that the amendment by the Supreme Court [in its order of Apr. 26, 1976] to subdivision (c) of rule 41 of the Federal Rules of Criminal Procedure [subd. (c) of this rule] is approved in a modified form.

1979 AMENDMENT

This amendment to Rule 41 is intended to make it possible for a search warrant to issue to search *for* a person under two circumstances: (i) when there is probable cause to arrest that person; or (ii) when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in this instance, that the person sought is at the place to be searched.

That part of the amendment which authorizes issuance of a search warrant to search for a person unlawfully restrained is consistent with ALI Model Code of Pre-Arraignment Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which specifies that a search warrant may issue to search for "an individual * * * who is unlawfully held in confinement or other restraint." As noted in the Commentary thereto, id. at p. 507:

> Ordinarily such persons will be held against their will and in that case the persons are, of course, not subject to "seizure." But they are, in a sense, "evidence" of

crime, and the use of search warrants for these purposes presents no conceptual difficulties.

Some state search warrant provisions also provide for issuance of a warrant in these circumstances. See, e.g., Ill.Rev.Stat. ch. 38, § 108–3 ("Any person who has been kidnapped in violation of the laws of this State, or who has been kidnapped in another jurisdiction and is now concealed within this State").

It may be that very often exigent circumstances, especially the need to act very promptly to protect the life or well-being of the kidnap victim, would justify an immediate warrantless search for the person restrained. But this is not inevitably the case. Moreover, as noted above, there should be available a process whereby law enforcement agents may acquire in advance a judicial determination that they have cause to intrude upon the privacy of those at the place where the victim is thought to be located.

That part of the amendment which authorizes issuance of a search warrant to search for a person to be arrested is also consistent with ALI Model Code of Pre-Arraignment Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which states that a search warrant may issue to search for "an individual for whose arrest there is reasonable cause." As noted in the Commentary thereto, id. at p. 507, it is desirable that there be "explicit statutory authority for such searches." Some state search warrant provisions also expressly provide for the issuance of a search warrant to search for a person to be arrested. See, e.g., Del. Code Ann. tit. 11, § 2305 ("Persons for whom a warrant of arrest has been issued"). This part of the amendment to Rule 41 covers a defendant or witness for whom an arrest warrant has theretofore issued, or a defendant for whom grounds to arrest exist even though no arrest warrant has theretofore issued. It also covers the arrest of a deportable alien under 8 U.S.C. § 1252, whose presence at a certain place might be important evidence of criminal conduct by another person, such as the harboring of undocumented aliens under 8 U.S.C. § 1324(a)(3).

In *United States* v. *Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976), the Court once again alluded to "the still unsettled question" of whether, absent exigent circumstances, officers acting without a warrant may enter private premises to make an arrest. Some courts have indicated that probable cause alone ordinarily is sufficient to support an arrest entry, *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973); *United States ex rel. Wright* v. *Woods*, 432 F.2d 1143 (7th Cir. 1970). There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, *United States* v. *Calhoun*, 542 F.2d 1094 (9th Cir. 1976); *United States* v. *Lindsay*, 506 F.2d 166 (D.C.Cir. 1974); *Dorman* v. *United States*, 435 F.2d 385 (D.C.Cir. 1970), or, at least, to enter the premises of a third party, *Virgin Islands* v. *Gereau*, 502 F.2d 914 (3d Cir. 1974); *Fisher* v. *Volz*, 496 F.2d 333 (3d Cir. 1974); *Huotari* v. *Vanderport*, 380 F.Supp. 645 (D. Minn. 1974).

It is also unclear, assuming a need for a warrant, what kind of warrant is required, although it is sometimes assumed that an arrest warrant will suffice, e.g., *United States* v. *Calhoun*, supra; *United States* v. *James*, 528 F.2d 999 (5th Cir. 1976). There is a growing body of authority, however, that what is needed to justify entry of the premises of a third party to arrest is a search warrant, e.g., *Virgin Islands* v. *Gereau*, supra; *Fisher* v. *Volz*, supra. The theory is that if the privacy of this third party is to be protected adequately, what is needed is a probable cause determination by a magistrate that the wanted person is presently within that party's premises. "A warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe the suspect committed the crime; it affords no basis to believe the suspect is in some stranger's home." *Fisher* v. *Volz*, supra.

It has sometimes been contended that a search warrant should be required for a nonexigent entry to arrest even when the premises to be entered are those of the person to be arrested. Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St.L.J. 56, 69 (1974). Case authority in support is lacking, and it may be that the protections of a search warrant are less important in such a situation because ordinarily "rudimentary police procedure dictates that a suspect's residence be eliminated as a possible hiding place before a search is conducted elsewhere." *People* v. *Sprovieri*, 95 Ill.App.2d 10, 238 N.E.2d 115 (1968).

Despite these uncertainties, the fact remains that in some circuits under some circumstances a search warrant is required to enter private premises to arrest. Moreover, the law on this subject is in a sufficient state of uncertainty that this position may be taken by other courts. It is thus important that Rule 41 clearly express that a search warrant for this purpose may issue. And even if future decisions head the other direction, the need for the amendment would still exist. It is clear that law enforcement officers "may not constitutionally enter the home of a private individual to search for another person, though he be named in a valid arrest warrant in their possession, absent probable cause to believe that the named suspect is present within at the time." *Fisher* v. *Volz*, supra. The cautious officer is entitled to a procedure whereby he may have this probable cause determination made by a neutral and detached magistrate in advance of the entry.

Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court

for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

NOTES OF ADVISORY COMMITTEE ON RULES

The rule-making power of the Supreme Court with respect to criminal proceedings was extended to proceedings to punish for criminal contempt of court by the Act of November 21, 1941 (55 Stat. 779), 18 U.S.C. former § 689 (now §§ 3771, 3772).

Note to Subdivision (a). This rule is substantially a restatement of existing law, *Ex parte Terry*, 128 U.S. 289; *Cooke* v. *United States*, 267 U.S. 517, 534, 45 S.Ct. 390, 69 L.Ed. 767.

Note to Subdivision (b). This rule is substantially a restatement of the procedure prescribed in 28 U.S.C. former §§ 386–390 (now 18 U.S.C. §§ 401, 402, 3285, 3691), and 29 U.S.C. former § 111 (now 18 U.S.C. § 3692).

2. The requirement in the second sentence that the notice shall describe the criminal contempt as such is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in *McCann* v. *New York Stock Exchange*, 80 F.2d 211, C.C.A.2d. See also *Nye* v. *United States*, 313 U.S. 33, 42–43, 61 S.Ct. 810, 85 L.Ed. 1172.

3. The fourth sentence relating to trial by jury preserves the right to a trial by jury in those contempt cases in which it is granted by statute, but does not enlarge the right or extend it to additional cases. The respondent in a contempt proceeding may demand a trial by jury as of right if the proceeding is brought under the Act of March 23, 1932, ch. 90, sec. 11, 47 Stat. 72, 29 U.S.C. former § 111 (now 18 U.S.C. § 3692) (Norris-La Guardia Act), or the Act of October 15, 1914, ch. 323, sec. 22, 38 Stat. 738, 28 U.S.C. § 387 (Clayton Act).

4. The provision in the sixth sentence disqualifying the judge affected by the contempt if the charge involves disrespect to or criticism of him, is based, in part, on 29 U.S.C. former § 112 (Contempts; demand for retirement of judge sitting in proceeding) and the observations of Chief Justice Taft in *Cooke* v. *United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 69 L.Ed. 767.

5. Among the statutory provisions defining criminal contempts are the following:

U.S.C. Title 7:
§ 499m (Perishable Agricultural Commodities Act; investigation of complaints; procedure; penalties; etc.—(c) Disobedience to subpenas; remedy; contempt)
U.S.C. Title 9:
§ 7 (Witnesses before arbitrators; fees, compelling attendance)
U.S.C. Title 11:
§ 69 (Referees; contempts before)
U.S.C. Title 15:
§ 49 (Federal Trade Commission; documentary evidence; depositions; witnesses)
§ 78u (Regulation of Securities Exchanges; investigation; injunctions and prosecution of offenses)
§ 100 (Trademarks; destruction of infringing labels; service of injunction, and proceedings for enforcement)
§ 155 (China Trade Act; authority of registrar in obtaining evidence)
U.S.C. Title 17 former:
§ 36 [now § 112] (Injunctions; service and enforcement)
U.S.C. Title 19:
§ 1333 (Tariff Commission; testimony and production of papers—(b) Witnesses and evidence)
U.S.C. Title 22 former:
§ 270f (International Bureaus; Congresses, etc.; perjury; contempts; penalties)
U.S.C. Title 28 former:
§ 385 [now § 459; 18 U.S.C. § 401] (Administration of oaths; contempts)
§ 386 [now 18 U.S.C. §§ 402, 3691] (Contempts; when constituting also criminal offense)
§ 387 [now 18 U.S.C. § 402] (Same; procedure; bail; attachment; trial; punishment) (Clayton Act; jury trial; section)
§ 388 (Same; review of conviction)
§ 389 [now 18 U.S.C. §§ 402, 3691] (Same; not specifically enumerated)
§ 390 [now 18 U.S.C. § 3285] (Same; limitations)
§ 390a [now 18 U.S.C. § 402] ("Person" or "persons" defined)
§ 648 [now 18 U.S.C., Appendix R. 17(f); 28 U.S.C., Appendix, R. 45(d)] (Depositions under dedimus potestatem; witnesses; when required to attend)
§ 703 (Punishment of witness for contempt)
§ 714 [now § 1784] (Failure of witness to obey subpena; order to show cause in contempt proceedings)
§ 715 [now § 1784] (Direction in order to show cause for seizure of property of witness in contempt)
§ 716 [now § 1784] (Service of order to show cause)
§ 717 [now § 1784] (Hearing on order to show cause; judgment; satisfaction)
§ 750 [now § 2405] (Garnishees in suits by United States against a corporation; garnishee failing to appear)
U.S.C. Title 29 former:
§ 111 [now 18 U.S.C. § 3692] (Contempts; speedy and public trial; jury) (Norris-La Guardia Act)
§ 112 [now 18 U.S.C., Appendix, R. 42] (Contempts; demands for retirement of judge sitting in proceeding)
§ 160 (Prevention of unfair labor practices—(h) Jurisdiction of courts unaffected by limitations prescribed in sections 101–115 of Title 29)
§ 161 (Investigatory powers of Board—(2) Court aid in compelling production of evidence and attendance of witnesses)
§ 209 (Fair Labor Standards Act; attendance of witnesses)
U.S.C. Title 33:
§ 927 (Longshoremen's and Harbor Workers' Compensation Act; powers of deputy commissioner)
U.S.C. Title 35 former:

§ 56 [now § 24] (Failing to attend or testify)
U.S.C. Title 47:
§ 409 (Federal Communications Commission; hearing; subpenas; oaths; witnesses; production of books and papers; contempts; depositions; penalties)
U.S.C. Title 48 former:
§ 1345a (Canal Zone; general jurisdiction of district court; issue of process at request of officials; witnesses; contempt)
U.S.C. Title 49:
§ 12 (Interstate Commerce Commission; authority and duties of commission; witnesses; depositions—(3) Compelling attendance and testimony of witnesses, etc.)

TAFT-HARTLEY INJUNCTIONS

Former section 112 of Title 29, Labor, upon which subd. (b) of this rule is in part based, as inapplicable to injunctions issued under the Taft-Hartley Act, see section 178 of said Title 29.

X. GENERAL PROVISIONS

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(35), 89 Stat. 376.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. The first sentence of the rule setting forth the necessity of the defendant's presence at arraignment and trial is a restatement of existing law, *Lewis* v. *United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011; *Diaz* v. *United States*, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500, Ann.Cas.1913C, 1138. This principle does not apply to hearings on motions made prior to or after trial, *United States* v. *Lynch*, 132 F.2d 111, C.C.A.3d.

2. The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence, *Diaz* v. *United States*, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500, Ann.Cas.1913C, 1138; *United States* v. *Noble*, 294 Fed. 689 (D.Mont.)—affirmed, 300 Fed. 689, C.C.A.9th; *United States* v. *Barracota*, 45 F.Supp. 38, S.D.N.Y.; *United States* v. *Vassalo*, 52 F.2d 699, E.D. Mich.

3. The fourth sentence of the rule empowering the court in its discretion, with the defendant's written consent, to conduct proceedings in misdemeanor cases in defendant's absence adopts a practice prevailing in some districts comprising very large areas. In such districts appearance in court may require considerable travel, resulting in expense and hardship not commensurate with the gravity of the charge, if a minor infraction is involved and a small fine is eventually imposed. The rule, which is in the interest of defendants in such situations, leaves it discretionary with the court to permit defendants in misdemeanor cases to absent themselves and, if so, to determine in what types of misdemeanors and to what extent. Similar provisions are found in the statutes of a number of States. See A.L.I. Code of Criminal Procedure, pp. 881–882.

4. The purpose of the last sentence of the rule is to resolve a doubt that at times has arisen as to whether it is necessary to bring the defendant to court from an institution in which he is confined, possibly at a distant point, if the court determines to reduce the sentence previously imposed. It seems in the interest of both the Government and the defendant not to require such presence, because of the delay and expense that are involved.

1974 AMENDMENT

The revision of rule 43 is designed to reflect *Illinois* v. *Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). In *Allen*, the court held that "there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." 397 U.S. at 343–344, 90 S.Ct. 1057.

Since rule 43 formerly limited trial in absentia to situations in which there is a "voluntary absence after the trial has been commenced," it could be read as precluding a federal judge from exercising the third option held to be constitutionally permissible in *Allen*. The amendment is designed to make clear that the judge does have the power to exclude the defendant from the courtroom when the circumstances warrant such action.

The decision in *Allen*, makes no attempt to spell out standards to guide a judge in selecting the appropriate method to ensure decorum in the courtroom and there is no attempt to do so in the revision of the rule.

The concurring opinion of Mr. Justice Brennan stresses that the trial judge should make a reasonable effort to enable an excluded defendant "to communicate with his attorney and, if possible, to keep apprised of the progress of the trial." 397 U.S. at 351, 90 S.Ct. 1057. The Federal Judicial Center is presently engaged in experimenting with closed circuit television in courtrooms. The experience gained from these experiments may make closed circuit television readily available in federal courtrooms through which an excluded defendant would be able to hear and observe the trial.

The defendant's right to be present during the trial on a capital offense has been said to be so fundamental that it may not be waived. *Diaz* v. *United States*, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (dictum); *Near* v. *Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963); C. Wright, Federal Practice and Procedure: Criminal § 723 at 199 (1969, Supp.1971).

However, in *Illinois* v. *Allen, supra* the court's opinion suggests that sanctions such as contempt may be least effective where the defendant is ultimately facing a far more serious sanction such as the death penalty. 397 U.S. at 345, 90 S.Ct. 1057. The ultimate determination of when a defendant can waive his right to be present in a capital case (assuming a death penalty provision is held constitutional, see *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)) is left for further clarification by the courts.

Subdivision (b)(1) makes clear that voluntary absence may constitute a waiver even if the defendant has not been informed by the court of his obligation to remain during the trial. Of course, proof of voluntary absence will require a showing that the defendant knew of the fact that the trial or other proceeding was going on. C. Wright, Federal Practice and Procedure: Criminal § 723 n. 35 (1969). But it is unnecessary to show that he was specifically warned of his obligation to be present; a warning seldom is thought necessary in current practice. [See *Taylor* v. *United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973).]

Subdivision (c)(3) makes clear that the defendant need not be present at a conference held by the court and counsel where the subject of the conference is an issue of law.

The other changes in the rule are editorial in nature. In the last phrase of the first sentence, "these rules" is changed to read "this rule," because there are no references in any of the other rules to situations where the defendant is not required to be present. The phrase "at the time of the plea," is added to subdivision (a) to make perfectly clear that defendant must be present at the time of the plea. See rule 11(c)(5) which provides that the judge may set a time, other than arraignment, for the holding of a plea agreement procedure.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 43 of the Federal Rules of Criminal Procedure deals with the presence of the defendant during the proceedings against him. It presently permits a defendant to be tried in absentia only in non-capital cases where the defendant has voluntarily absented himself after the trial has begun.

The Supreme Court amendments provide that a defendant has waived his right to be present at the trial of a capital or noncapital case in two circumstances: (1) when he voluntarily absents himself after the trial has begun; and (2) where he "engages in conduct which is such as to justify his being excluded from the courtroom."

B. Committee Action. The Committee added language to subdivision (b)(2), which deals with excluding a disruptive defendant from the courtroom. The Advisory Committee Note indicates that the rule proposed by the Supreme Court was drafted to reflect the decision in *Illinois* v. *Allen*, 397 U.S. 337 (1970). The Committee found that subdivision (b)(2) as proposed did not full track the *Allen* decision. Consequently, language was added to that subsection to require the court to warn a disruptive defendant before excluding him from the courtroom.

Rule 44. Right to and Assignment of Counsel

(a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

(b) Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 30, 1979, eff. Dec. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions. The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

28 U.S.C. former § 394 (now § 1654) provides:

"In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein."

18 U.S.C. former § 563 (now § 3005), which is derived from the act of April 30, 1790 (1 Stat. 118), provides:

"Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours."

The present extent of the right of counsel has been defined recently in *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Walker* v. *Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830; and *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, rehearing denied 315 U.S. 827, 62 S.Ct. 629, 637, two cases, 86 L.Ed. 1222. The rule is a restatement of the principles enunciated in these decisions. See, also, Holtzoff, 20 N.Y.U.L. Q.R. 1.

2. The rule is intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in court and, therefore, does not include preliminary proceedings before a committing magistrate. Although the defendant is not entitled to have counsel assigned to him in connection with preliminary proceedings, he is entitled to be represented by counsel retained by him, if he so chooses, Rule 5(b) (Proceedings before the Commissioner; Statement by the Commissioner) and Rule 40(b)(2) (Commitment to Another District; Removal—Arrest in Distant District—Statement by Commissioner or Judge). As to defendant's right of counsel in connection with the taking of depositions, see Rule 15(c) (Depositions—Defendant's Counsel and Payment of Expenses).

1966 AMENDMENT

A new rule is provided as a substitute for the old to provide for the assignment of counsel to defendants unable to obtain counsel during all stages of the proceeding. The Supreme Court has recently made clear the importance of providing counsel both at the earliest possible time after arrest and on appeal. See *Crooker* v. *California*, 357 U.S. 433 (1958); *Cicenia* v. *LaGay*, 357 U.S. 504 (1958); *White* v. *Maryland*, 373 U.S. 59 (1963); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963). See also Association of the Bar of the City of New York, Special Committee to Study the Defender System, Equal Justice for the Accused (1959); Report of the Attorney General's Committee on Poverty and the Administration of Justice (1963); Beaney, Right to Counsel Before Arraignment, 45 Minn.L.Rev. 771 (1961); Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn.L.Rev. 783 (1961); Douglas, The Right to Counsel—A Foreword, 45 Minn.L.Rev. 693 (1961); Kamisar, The Right to Counsel and the Fourteenth Amendment; A Dialogue on "The Most Pervasive Right" of an Accused, 30 U.Chi.L.Rev. 1 (1962); Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich.L.Rev. 219 (1962); Symposium, The Right to Counsel, 22 Legal Aid Briefcase 4–48 (1963). Provision has been made by law for a Legal Aid Agency in the District of Columbia which is charged with the duty of providing counsel and courts are admonished to assign such counsel "as early in the proceeding as practicable." D.C.Code § 2–2202. Congress has now made provision for assignment of counsel and their compensation in all of the districts. Criminal Justice Act of 1964 (78 Stat. 552).

Like the original rule the amended rule provides a right to counsel which is broader in two respects than that for which compensation is provided in the Criminal Justice Act of 1964: (1) the right extends to petty offenses to be tried in the district courts, and (2) the right extends to defendants unable to obtain counsel for reasons other than financial. These rules do not cover procedures other than those in the courts of the United States and before United States commissioners. See Rule 1. Hence, the problems relating to the providing of counsel prior to the initial appearance before a court or commissioner are not dealt with in this rule. Cf. *Escobedo* v. *United States*, 378 U.S. 478 (1964); Enker and Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn.L.Rev. 47 (1964).

Subdivision (a). This subdivision expresses the right of the defendant unable to obtain counsel to have such counsel assigned at any stage of the proceedings from his initial appearance before the commissioner or court through the appeal, unless he waives such right. The phrase "from his initial appearance before the commissioner or court" is intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel. The right to assignment of counsel is not limited to those financially unable to obtain counsel. If a defendant is able to compensate counsel but still cannot obtain counsel, he is entitled to the assignment of counsel even though not to free counsel.

Subdivision (b). This new subdivision reflects the adoption of the Criminal Justice Act of 1964. See Report of the Judicial Conference of the United States on the Criminal Justice Act of 1964, 36 F.R.D. 277 (1964).

1972 AMENDMENT

Subdivision (a) is amended to reflect the Federal Magistrates Act of 1968. The phrase "federal magistrate" is defined in rule 54.

1979 AMENDMENT

Rule 44(c) establishes a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel. Although "courts have differed with

respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests," *Holloway* v. *Arkansas*, 98 S.Ct. 1173 (1978) (where the Court found it unnecessary to reach this issue), this amendment is generally consistent with the current state of the law in several circuits. As held in *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976):

> When a potential conflict of interest arises, either where a court has assigned the same counsel to represent several defendants or where the same counsel has been retained by co-defendants in a criminal case, the proper course of action for the trial judge is to conduct a hearing to determine whether a conflict exists to the degree that a defendant may be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment. The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views.

See also *United States* v. *Lawriw*, 568 F.2d 98 (8th Cir. 1977) (duty on trial judge to make inquiry where joint representation by appointed or retained counsel, and "without such an inquiry a finding of knowing and intelligent waiver will seldom, if ever, be sustained by this Court"); *Abraham* v. *United States*, 549 F.2d 236 (2d Cir. 1977); *United States* v. *Mari*, 526 F.2d 117 (2d Cir. 1975); *United States* v. *Truglio*, 493 F.2d 574 (4th Cir. 1974) (joint representation should cause trial judge "to inquire whether the defenses to be presented in any way conflict"); *United States* v. *DeBerry*, 487 F.2d 488 (2d Cir. 1973); *United States ex rel. Hart* v. *Davenport*, 478 F.2d 203 (3d Cir. 1973) (noting there "is much to be said for the rule . . . which assumes prejudice and nonwaiver if there has been no on-the-record inquiry by the court as to the hazards to defendants from joint representation"); *United States* v. *Alberti*, 470 F.2d 878 (2d Cir. 1973); *United States* v. *Foster*, 469 F.2d 1 (1st Cir. 1972) (lack of sufficient inquiry shifts the burden of proof on the question of prejudice to the government); *Campbell* v. *United States*, 352 F.2d 359 (D.C.Cir.1965) (where joint representation, court "has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it"). Some states have taken a like position; see, e.g., *State* v. *Olsen*, Minn. 1977, 258 N.W.2d 898.

This procedure is also consistent with that recommended in the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972), which provide in § 3.4(b):

> Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel.

Avoiding a conflict-of-interest situation is in the first instance a responsibility of the attorney. If a lawyer represents "multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment," and he is to "resolve all doubts against the propriety of the representation." Code of Professional Responsibility, Ethical Consideration 5–15. See also ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971), concluding that the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

It by no means follows that the inquiry provided for by rule 44(c) is unnecessary. For one thing, even the most diligent attorney may be unaware of facts giving rise to a potential conflict. Often "counsel must operate somewhat in the dark and feel their way uncertainly to an understanding of what their clients may be called upon to meet upon a trial" and consequently "are frequently unable to foresee developments which may require changes in strategy." *United States* v. *Carrigan*, supra (concurring opinion). "Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver." *United States* v. *Lawriw*, supra.

Moreover, it is important that the trial judge ascertain whether the effective and fair administration of justice would be adversely affected by continued joint representation, even when an actual conflict is not then apparent. As noted in *United States* v. *Mari*, supra (concurring opinion):

> Trial court insistence that, except in extraordinary circumstances, codefendants retain separate counsel will in the long run . . . prove salutary not only to the administration of justice and the appearance of justice but the cost of justice; habeas corpus petitions, petitions for new trials, appeals and occasionally retrials . . . can be avoided. Issues as to whether there is an actual conflict of interest, whether the conflict has resulted in prejudice, whether there has been a waiver, whether the waiver is intelligent and knowledgeable, for example, can all be avoided. Where a conflict that first did not appear subsequently arises in or before trial, . . . continuances or mistrials can be saved. Essentially by the time a case . . . gets to the appellate level the harm to the appearance of justice has already been done, whether or not reversal occurs; at the trial level it is a matter which is so easy to avoid.

A rule 44(c) inquiry is required whether counsel is assigned or retained. It "makes no difference whether counsel is appointed by the court or selected by the defendants; even where selected by the defendants the same dangers of potential conflict exist, and it is also possible that the rights of the public to the proper administration of justice may be affected adversely." *United States* v. *Mari*, supra (concurring opinion). See also *United States* v. *Lawriw*, supra. When there has been "no discussion as to possible conflict initiated by the court," it cannot be assumed that the choice of counsel by the defendants "was intelligently made with knowledge of any possible conflict." *United States* v. *Carrigan*, supra. As for assigned counsel, it is provided by statute

that "the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown." 18 U.S.C. § 3006(A)(b). Rule 44(c) is not intended to prohibit the automatic appointment of separate counsel in the first instance, see *Ford* v. *United States*, 379 F.2d 123 (D.C.Cir.1967); *Lollar* v. *United States*, 376 F.2d 243 (D.C.Cir.1967), which would obviate the necessity for an inquiry.

Under rule 44(c), an inquiry is called for when the joined defendants are represented by the same attorney and also when they are represented by attorneys "associated in the practice of law." This is consistent with Code of Professional Responsibility, Disciplinary Rule 5–105(D) (providing that if "a lawyer is required to decline employment or to withdraw from employment" because of a potential conflict, "no partner or associate of his or his firm may accept or continue such employment"); and ABA Standards Relating to the Defense Function § 3.5(b) (Approved Draft, 1971) (applicable to "a lawyer or lawyers who are associated in practice"). Attorneys representing joined defendants should so advise the court if they are associated in the practice of law.

The rule 44(c) procedure is not limited to cases expected to go to trial. Although the more dramatic conflict situations, such as when the question arises as to whether the several defendants should take the stand, *Morgan* v. *United States*, 396 F.2d 110 (2d Cir. 1968), tend to occur in a trial context, serious conflicts may also arise when one or more of the jointly represented defendants pleads guilty.

> The problem is that even where as here both codefendants pleaded guilty there are frequently potential conflicts of interest . . . [T]he prosecutor may be inclined to accept a guilty plea from one codefendant which may harm the interests of the other. The contrast in the dispositions of the cases may have a harmful impact on the codefendant who does not initially plead guilty; he may be pressured into pleading guilty himself rather than face his codefendant's bargained-for testimony at a trial. And it will be his own counsel's recommendation to the initially pleading codefendant which will have contributed to this harmful impact upon him . . . [I]n a given instance it would be at least conceivable that the prosecutor would be willing to accept pleas to lesser offenses from two defendants in preference to a plea of guilty by one defendant to a greater offense.

United States v. *Mari*, supra (concurring opinion). To the same effect is ABA Standards Relating to the Defense Function at 213–14.

It is contemplated that under rule 44(c) the court will make appropriate inquiry of the defendants and of counsel regarding the possibility of a conflict of interest developing. Whenever it is necessary to make a more particularized inquiry into the nature of the contemplated defense, the court should "pursue the inquiry with defendants and their counsel on the record but in chambers" so as "to avoid the possibility of prejudicial disclosures to the prosecution." *United States* v. *Foster*, supra. It is important that each defendant be "fully advised of the facts underlying the potential conflict and is given an opportunity to express his or her views." *United States* v. *Alberti*, supra. The rule specifically requires that the court personally advise each defendant of his right to effective assistance of counsel, including separate representation. See *United States* v. *Foster*, supra, requiring that the court make a determination that jointly represented defendants "understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government."

Under rule 44(c), the court is to take appropriate measures to protect each defendant's right to counsel unless it appears "there is good cause to believe no conflict of interest is likely to arise" as a consequence of the continuation of such joint representation. A less demanding standard would not adequately protect the Sixth Amendment right to effective assistance of counsel or the effective administration of criminal justice. Although joint representation "is not per se violative of constitutional guarantees of effective assistance of counsel, *Holloway* v. *Arkansas*, supra, it would not suffice to require the court to act only when a conflict of interest is then apparent, for it is not possible to "anticipate with complete accuracy the course that a criminal trial may take." *Fryar* v. *United States*, 404 F.2d 1071 (10th Cir. 1968). This is particularly so in light of the fact that if a conflict later arises and a defendant thereafter raises a Sixth Amendment objection, a court must grant relief without indulging "in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U.S. 60 (1942). This is because, as the Supreme Court more recently noted in *Holloway* v. *Arkansas*, supra, "in a case of joint representation of conflicting interests the evil . . . is in what the advocate finds himself compelled to refrain from doing," and this makes it "virtually impossible" to assess the impact of the conflict.

Rule 44(c) does not specify what particular measures must be taken. It is appropriate to leave this within the court's discretion, for the measures which will best protect each defendant's right to counsel may well vary from case to case. One possible course of action is for the court to obtain a knowing, intelligent and voluntary waiver of the right to separate representation, for, as noted in *Holloway* v. *Arkansas*, supra, "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." See *United States* v. *DeBerry*, supra, holding that defendants should be jointly represented only if "the court has ascertained that . . . each understands clearly the possibilities of a conflict of interest and waives any rights in connection with it." It must be emphasized that a "waiver of the right to separate representation should not be accepted by the court unless the defendants have each been informed of the probable hazards; and the voluntary character of their waiver is apparent." ABA Standards Relating to the Function of the Trial Judge at 45. *United States* v. *Garcia*, supra, spells out in significant detail what should be done to assure an adequate waiver:

> As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has

been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. It is, of course, vital that the waiver be established by "clear, unequivocal, and unambiguous language." . . . Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloque between defendant and judge, will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

See also Hyman, Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache, 5 Hofstra L.Rev. 315, 334 (1977).

Another possibility is that the court will order that the defendants be separately represented in subsequent proceedings in the case.

Though the court must remain alert to and take account of the fact that "certain advantages might accrue from joint representation," *Holloway* v. *Arkansas*, supra, it need not permit the joint representation to continue merely because the defendants express a willingness to so proceed. That is, there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of the trial court to require separate representation may . . . require a new trial, even though the defendants have expressed a desire to continue with the same counsel. The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney.

United States v. *Carrigan*, supra (concurring opinion). See also *United States* v. *Lawriw*, supra; *Abraham* v. *United States*, supra; ABA Standards Relating to the Defense Function at 213, concluding that in some circumstances "even full disclosure and consent of the client may not be an adequate protection." As noted in *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), such an order may be necessary where the trial judge is

not satisfied that the waiver is proper. For example, a defendant may be competent enough to stand trial, but not competent enough to understand the complex, subtle, and sometimes unforeseeable dangers inherent in multiple representation. More importantly, the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices multiple representation might entail for him.

As concluded in *Dolan*, "exercise of the court's supervisory powers by disqualifying an attorney representing multiple criminal defendants in spite of the defendants' express desire to retain that attorney does not necessarily abrogate defendant's sixth amendment rights". It does not follow from the absolute right of self-representation recognized in *Faretta* v. *California*, 422 U.S. 806 (1975), that there is an *absolute* right to counsel of one's own choice. Thus,

when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver. Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation.

United States v. *Dolan*, supra. See also Geer, Conflict of Interest and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney, 62 Minn.L.Rev. 119 (1978); Note, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J.Crim.L. & C. 226 (1977).

The failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant. However, as is currently the case, a reviewing court is more likely to assume a conflict resulted from the joint representation when no inquiry or an inadequate inquiry was conducted. *United States* v. *Carrigan*, supra; *United States* v. *DeBerry*, supra. On the other hand, the mere fact that a rule 44(c) inquiry was conducted in the early stages of the case does not relieve the court of all responsibility in this regard thereafter. The obligation placed upon the court by rule 44(c) is a continuing one, and thus in a particular case further inquiry may be necessary on a later occasion because of new developments suggesting a potential conflict of interest.

Rule 45. Time

(a) Computation. In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial

Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

[(c) Unaffected by Expiration of Term.] (Rescinded Feb. 28, 1966, eff. July 1, 1966.)

(d) For Motions; Affidavits. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period.

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Apr. 28, 1982, eff. Aug. 1, 1982.)

NOTES OF ADVISORY COMMITTEE ON RULES

The rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. It seems desirable that matters covered by this rule should be regulated in the same manner for civil and criminal cases, in order to preclude possibility of confusion.

Note to Subdivision (a). This rule supersedes the method of computing time prescribed by Rule 13 of the Criminal Appeals Rules, promulgated on May 7, 1934, 292 U.S. 661.

Note to Subdivision (c). This rule abolishes the expiration of a term of court as a time limitation for the taking of any step in a criminal proceeding, as is done for civil cases by Rule 6(c) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. In view of the fact that the duration of terms of court varies among the several districts and the further fact that the length of time for the taking of any step limited by a term of court depends on the stage within the term when the time begins to run, specific time limitations have been substituted for the taking of any step which previously had to be taken within the term of court.

Note to Subdivision (d). Cf. Rule 47 (Motions) and Rule 49 (Service and filing of papers).

1966 AMENDMENT

Subdivision (a). This amendment conforms the subdivision with the amendments made effective on July 1, 1963, to the comparable provision in Civil Rule 6(a). The only major change is to treat Saturdays as legal holidays for the purpose of computing time.

Subdivision (b). The amendment conforms the subdivision to the amendments made effective in 1948 to the comparable provision in Civil Rule 6(b). One of these conforming changes, substituting the words "extend the time" for the words "enlarge the period" clarifies the ambiguity which gave rise to the decision in *United States* v. *Robinson*, 361 U.S. 220 (1960). The amendment also, in connection with the amendments to Rules 29 and 37, makes it clear that the only circumstances under which extensions can be granted under Rules 29, 33, 34, 35, 37(a)(2) and 39(c) are those stated in them.

Subdivision (c). Subdivision (c) of Rule 45 is rescinded as unnecessary in view of the 1963 amendment to 28 U.S.C. § 138 eliminating terms of court.

1968 AMENDMENT

The amendment eliminates inappropriate references to Rules 37 and 39 which are to be abrogated.

1971 AMENDMENT

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C., § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

1982 AMENDMENT

The amendment to subdivision (a) takes account of the fact that on rare occasion severe weather conditions or other circumstances beyond control will make it impossible to meet a filing deadline under Rule 45(a). Illustrative is an incident which occurred in Columbus, Ohio during the "great blizzard of 1978," in which weather conditions deteriorated to the point where personnel in the clerk's office found it virtually impossible to reach the courthouse, and where the GSA Building Manager found it necessary to close and secure the entire building. The amendment covers that situation and also similar situations in which weather or other conditions made the

clerk's office, though open, not readily accessible to the lawyer. Whether the clerk's office was in fact "inaccessible" on a given date is to be determined by the district court. Some state time computation statutes contain language somewhat similar to that in the amendment; see, e.g., Md.Code Ann. art. 94, § 2.

Rule 46. Release from Custody

(a) Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. §§ 3142 and 3144.

(b) Release During Trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial.

(c) Pending Sentence and Notice of Appeal. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(d) Justification of Sureties. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(e) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(g) Supervision of Detention Pending Trial. The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of his deposition pursuant to Rule 15(a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.

(h) Forfeiture of Property. Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 3142(c)(2)(K) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.

(As amended Apr. 9, 1956, eff. July 8, 1956; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Oct. 12, 1984, Pub.L. 98–473, Title II, § 209(d), 98 Stat. 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)(1). This rule is substantially a restatement of existing law, 18 U.S.C. former §§ 596, 597 (now § 3141).

Note to Subdivision (a)(2). This rule is substantially a restatement of Rule 6 of Criminal Appeals Rules, with the addition of a reference to bail pending certiorari. This rule does not supersede 18 U.S.C. former § 682 (now

§ 3731) (Appeals; on behalf of the United States; rules of practice and procedure), which provides for the admission of the defendant to bail on his own recognizance pending an appeal taken by the Government.

Note to Subdivision (b). This rule is substantially a restatement of existing law, 28 U.S.C. former § 657.

Note to Subdivision (d). This rule is a restatement of existing practice, and is based in part on 6 U.S.C. § 15 (Bonds or notes of United States in lieu of recognizance, stipulation, bond, guaranty, or undertaking; place of deposit; return to depositor; contractors' bonds).

Note to Subdivision (e). This rule is similar to Sec. 79 of A.L.I. Code of Criminal Procedure introducing, however, an element of flexibility. Corporate sureties are regulated by 6 U.S.C. §§ 6–14.

Note to Subdivision (f). 1. With the exception hereafter noted, this rule is substantially a restatement of existing law in somewhat greater detail than contained in 18 U.S.C. former § 601 (Remission of penalty of recognizance).

2. Subdivision (f)(2) changes existing law in that it increases the discretion of the court to set aside a forfeiture. The power of the court under 18 U.S.C. former § 601 was limited to cases in which the defendant's default had not been willful.

3. The second sentence of paragraph (3) is similar to Rule 73(f) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. This paragraph also substitutes simple motion procedure for enforcing forfeited bail bonds for the procedure by scire facias, which was abolished by Rule 81(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (g). This rule is a restatement of existing law and practice. It is based in part on 18 U.S.C. former § 599 (now § 3142) (Surrender by bail).

1966 AMENDMENT

Subdivision (c). The more inclusive word "terms" is substituted for "amount" in view of the amendment to subdivision (d) authorizing releases without security on such conditions as are necessary to insure the appearance of the defendant. The phrase added at the end of this subdivision is designed to encourage commissioners and judges to set the terms of bail so as to eliminate unnecessary detention. See *Stack* v. *Boyle*, 342 U.S. 1 (1951); *Bandy* v. *United States*, 81 S.Ct. 197 (1960); *Bandy* v. *United States*, 82 S.Ct. 11 (1961); *Carbo* v. *United States*, 82 S.Ct. 662 (1962); review den. 369 U.S. 868 (1962).

Subdivision (d). The amendments are designed to make possible (and to encourage) the release on bail of a greater percentage of indigent defendants than now are released. To the extent that other considerations make it reasonably likely that the defendant will appear it is both good practice and good economics to release him on bail even though he cannot arrange for cash or bonds in even small amounts. In fact it has been suggested that it may be a denial of constitutional rights to hold indigent prisoners in custody for no other reason than their inability to raise the money for a bond. *Bandy* v. *United States*, 81 S.Ct. 197 (1960).

The first change authorizes the acceptance as security of a deposit of cash or government securities in an amount less than the face amount of the bond. Since a defendant typically purchases a bail bond for a cash payment of a certain percentage of the face of the bond, a direct deposit with the court of that amount (returnable to the defendant upon his appearance) will often be equally adequate as a deterrent to flight. Cf. Ill. Code Crim. Proc. § 110–7 (1963).

The second change authorizes the release of the defendant without financial security on his written agreement to appear when other deterrents appear reasonably adequate. See the discussion of such deterrents in *Bandy* v. *United States*, 81 S.Ct. 197 (1960). It also permits the imposition of nonfinancial conditions as the price of dispensing with security for the bond. Such conditions are commonly used in England. Devin, The Criminal Prosecution in England, 89 (1958). See the suggestion in Note, Bail: An Ancient Practice Reexamined, 70 Yale L.J. 966, 975 (1961) that such conditions "* * * might include release in custody of a third party, such as the accused's employer, minister, attorney, or a private organization; release subject to a duty to report periodically to the court or other public official; or even release subject to a duty to return to jail each night." Willful failure to appear after forfeiture of bail is a separate criminal offense and hence an added deterrent to flight. 18 U.S.C. § 3146.

For full discussion and general approval of the changes made here see Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 58–89 (1963).

Subdivision (h). The purpose of this new subdivision is to place upon the court in each district the responsibility for supervising the detention of defendants and witnesses and for eliminating all unnecessary detention. The device of the report by the attorney for the government is used because in many districts defendants will be held in custody in places where the court sits only at infrequent intervals and hence they cannot be brought personally before the court without substantial delay. The magnitude of the problem is suggested by the facts that during the fiscal year ending June 30, 1960, there were 23,811 instances in which persons were held in custody pending trial and that the average length of detention prior to disposition (i.e., dismissal, acquittal, probation, sentence to imprisonment, or any other method of removing the case from the court docket) was 25.3 days. Federal Prisons 1960, table 22, p. 60. Since 27,645 of the 38,855 defendants whose cases were terminated during the fiscal year ending June 30, 1960, pleaded guilty (United States Attorneys Statistical Report, October 1960, p. 1 and table 2), it would appear that the greater part of the detention reported occurs prior to the initial appearance of the defendant before the court.

1972 AMENDMENT

The amendments are intended primarily to bring rule 46 into general conformity with the Bail Reform Act of 1966 and to deal in the rule with some issues not now included within the rule.

Subdivision (a) makes explicit that the Bail Reform Act of 1966 controls release on bail prior to trial. 18 U.S.C. § 3146 refers to release of a defendant. 18 U.S.C. § 3149 refers to release of a material witness.

Subdivision (b) deals with an issue not dealt with by the Bail Reform Act of 1966 or explicitly in former rule 46, that is, the issue of bail during trial. The rule gives the trial judge discretion to continue the prior conditions of release or to impose such additional conditions as are adequate to insure presence at trial or to insure that his conduct will not obstruct the orderly and expeditious progress of the trial.

Subdivision (c) provides for release during the period between a conviction and sentencing and for the giving of a notice of appeal or of the expiration of the time allowed for filing notice of appeal. There are situations in which defense counsel may informally indicate an intention to appeal but not actually give notice of appeal for several days. To deal with this situation the rule makes clear that the district court has authority to release under the terms of 18 U.S.C. § 3148 pending notice of appeal (*e.g.*, during the ten days after entry of judgment; see rule 4(b) of the Rules of Appellate Procedure). After the filing of notice of appeal, release by the district court shall be in accordance with the provisions of rule 9(b) of the Rules of Appellate Procedure. The burden of establishing that grounds for release exist is placed upon the defendant in the view that the fact of conviction justifies retention in custody in situations where doubt exists as to whether a defendant can be safely released pending either sentence or the giving of notice of appeal.

Subdivisions (d), (e), (f), and (g) remain unchanged. They were formerly lettered (e), (f), (g), and (h).

Rule 47. Motions

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is substantially the same as the corresponding civil rule (first sentence of Rule 7(b)(1), Federal Rules of Civil Procedure), 28 U.S.C., Appendix, except that it authorizes the court to permit motions to be made orally and does not require that the grounds upon which a motion is made shall be stated "with particularity," as is the case with the civil rule.

2. This rule is intended to state general requirements for all motions. For particular provisions applying to specific motions, see Rules 6(b)(2), 12, 14, 15, 16, 17(b) and (c), 21, 22, 29 and Rule 41(e). See also Rule 49.

3. The last sentence providing that a motion may be supported by affidavit is not intended to permit "speaking motions" (e.g. motion to dismiss an indictment for insufficiency supported by affidavits), but to authorize the use of affidavits when affidavits are appropriate to establish a fact (e.g. authority to take a deposition or former jeopardy).

Rule 48. Dismissal

(a) By Attorney for Government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). 1. The first sentence of this rule will change existing law. The common-law rule that the public prosecutor may enter a nolle prosequi in his discretion, without any action by the court, prevails in the Federal courts, *Confiscation Cases*, 7 Wall. 454, 457; *United States* v. *Woody*, 2 F.2d 262 (D. Mont.). This provision will permit the filing of a nolle prosequi only by leave of court. This is similar to the rule now prevailing in many States. A.L.I. Code of Criminal Procedure, Commentaries, pp. 895–897.

2. The rule confers the power to file a dismissal by leave of court on the Attorney General, as well as on the United States attorney, since under existing law the Attorney General exercises "general superintendence and direction" over the United States attorneys "as to the manner of discharging their respective duties," 5 U.S.C. former § 317 (now 28 U.S.C. §§ 507, 547). Moreover it is the administrative practice for the Attorney General to supervise the filing of a nolle prosequi by United States attorneys. Consequently it seemed appropriate that the Attorney General should have such power directly.

3. The rule permits the filing of a dismissal of an indictment, information or complaint. The word "complaint" was included in order to resolve a doubt prevailing in some districts as to whether the United States attorney may file a nolle prosequi between the time when the defendant is bound over by the United States commissioner and the finding of an indictment. It has been assumed in a few districts that the power does not exist and that the United States attorney must await action of the grand jury, even if he deems it proper to dismiss the prosecution. This situation is an unnecessary hardship to some defendants.

4. The second sentence is a restatement of existing law, *Confiscation Cases*, 7 Wall. 454–457; *United States* v. *Shoemaker*, 27 Fed. Cases No. 16,279, C.C.Ill. If the trial has commenced, the defendant has a right to insist on a disposition on the merits and may properly object to the entry of a nolle prosequi.

Note to Subdivision (b). This rule is a restatement of the inherent power of the court to dismiss a case for want of prosecution. *Ex parte Altman*, 34 F.Supp. 106, S.D. Cal.

Rule 49. Service and Filing of Papers

(a) Service: When Required. Written motions other than those which are heard *ex parte*, written

notices, designations of record on appeal and similar papers shall be served upon each of the parties.

(b) Service: How Made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of Orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a notice thereof and shall make a note in the docket of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 4(b) of the Federal Rules of Appellate Procedure.

(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.)

References in Text. The Federal Rules of Appellate Procedure, referred to in subsec. (c), are set out in this pamphlet.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is substantially the same as Rule 5(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, with such adaptations as are necessary for criminal cases.

Note to Subdivision (b). The first sentence of this rule is in substance the same as the first sentence of Rule 5(b) of the Federal Rules of Civil Procedure. The second sentence incorporates by reference the second and third sentences of Rule 5(b) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (c). This rule is an adaptation for criminal proceedings of Rule 77(d) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. No consequence attaches to the failure of the clerk to give the prescribed notice, but in a case in which the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, it was held competent for the trial judge, in the exercise of sound discretion, to vacate the judgment because of clerk's failure to give notice and to enter a new judgment, the term of court not having expired. *Hill* v. *Hawes,* 320 U.S. 520, 64 S.Ct. 334, 88 L.Ed. 283, rehearing denied 321 U.S. 801, 64 S.Ct. 515, 88 L.Ed. 1088.

Note to Subdivision (d). This rule incorporates by reference Rule 5(d) and (e) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

1966 AMENDMENT

Subdivision (a). The words "adverse parties" in the original rule introduced a question of interpretation. When, for example, is a co-defendant an adverse party? The amendment requires service on each of the parties thus avoiding the problem of interpretation and promoting full exchange of information among the parties. No restriction is intended, however, upon agreements among co-defendants or between the defendants and the government restricting exchange of papers in the interest of eliminating unnecessary expense. Cf. the amendment made effective July 1, 1963, to Civil Rule 5(a).

Subdivision (c). The words "affected thereby" are deleted in order to require notice to all parties. Cf. the similar change made effective July 1, 1963, to Civil Rule 77(d).

The sentence added at the end of the subdivision eliminates the possibility of extension of the time to appeal beyond the provision for a 30 day extension on a showing or "excusable neglect" provided in Rule 37(a)(2). Cf. the similar change made in Civil Rule 77(d) effective in 1948. The question has arisen in a number of cases whether failure or delay in giving notice on the part of the clerk results in an extension of the time for appeal. The "general rule" has been said to be that in the event of such failure or delay "the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of entry of the order." *Lohman* v. *United States,* 237 F.2d 645, 646 (6th Cir. 1956). See also *Rosenbloom* v. *United States,* 355 U.S. 80 (1957) (permitting an extension). In two cases it has been held that no extension results from the failure to give notice of entry of judgments (as opposed to orders) since such notice is not required by Rule 49(d). *Wilkinson* v. *United States,* 278 F.2d 604 (10th Cir. 1960), cert. den. 363 U.S. 829; *Hyche* v. *United States,* 278 F.2d 915 (5th Cir. 1960), cert. den. 364 U.S. 881. The excusable neglect extension provision in Rule 37(a)(2) will cover most cases where failure of the clerk to give notice of judgments or orders has misled the defendant. No need appears for an indefinite extension without time limit beyond the 30 day period.

1968 AMENDMENT

The amendment corrects the reference to Rule 37(a)(2), the pertinent provisions of which are contained in Rule 4(b) of the Federal Rules of Appellate Procedure.

Rule 50. Calendars; Plan for Prompt Disposition

(a) Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

(b) Plans for Achieving Prompt Disposition of Criminal Cases. To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the prompt disposition of criminal cases in accordance

with the provisions of Chapter 208 of Title 18, United States Code.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Mar. 18, 1974, eff. July 1, 1974; Apr. 26, 1976, eff. Aug. 1, 1976.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is a restatement of the inherent residual power of the court over its own calendars, although as a matter of practice in most districts the assignment of criminal cases for trial is handled by the United States attorney. Cf. Federal Rules of Civil Procedure, Rules 40 and 78, 28 U.S.C., Appendix. The direction that preference shall be given to criminal proceedings as far as practicable is generally recognized as desirable in the orderly administration of justice.

1972 AMENDMENT

The addition to the rule proposed by subdivision (b) is designed to achieve the more prompt disposition of criminal cases.

Preventing undue delay in the administration of criminal justice has become an object of increasing interest and concern. This is reflected in the Congress. See, e.g., 116 Cong. Rec. S7291–97 (daily ed. May 18, 1970) (remarks of Senator Ervin). Bills have been introduced fixing specific time limits. See S. 3936, H.R. 14822, H.R. 15888, 91st Cong., 2d Sess. (1970).

Proposals for dealing with the problem of delay have also been made by the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) especially pp. 84–90, and by the American Bar Association Project on Standards for Criminal Justice, Standards Relating to Speedy Trial (Approved Draft, 1968). Both recommend specific time limits for each stage in the criminal process as the most effective way of achieving prompt disposition of criminal cases. See also Note, Nevada's 1967 Criminal Procedure Law from Arrest to Trial: One State's Response to a Widely Recognized Need, 1969 Utah L. Rev. 520, 542 No. 114.

Historically, the right to a speedy trial has been thought of as a protection for the defendant. Delay can cause a hardship to a defendant who is in custody awaiting trial. Even if afforded the opportunity for pretrial release, a defendant nonetheless is likely to suffer anxiety during a period of unwanted delay, and he runs the risk that his memory and those of his witnesses may suffer as time goes on.

Delay can also adversely affect the prosecution. Witnesses may lose interest or disappear or their memories may fade thus making them more vulnerable to cross-examination. See Note, The Right to a Speedy Criminal Trial, 57 Colum.L.Rev. 846 (1957).

There is also a larger public interest in the prompt disposition of criminal cases which may transcend the interest of the particular prosecutor, defense counsel, and defendant. Thus there is need to try to expedite criminal cases even when both prosecution and defense may be willing to agree to a continuance or continuances. It has long been said that it is the certain and prompt imposition of a criminal sanction rather than its severity that has a significant deterring effect upon potential criminal conduct. See Banfield and Anderson, Continuances in the Cook County Criminal Courts, 35 U.Chi.L.Rev. 259, 259–63 (1968).

Providing specific time limits for each stage of the criminal justice system is made difficult, particularly in federal courts, by the widely varying conditions which exist between the very busy urban districts on the one hand and the far less busy rural districts on the other hand. In the former, account must be taken of the extremely heavy caseload, and the prescription of relatively short time limits is realistic only if there is provided additional prosecutorial and judicial manpower. In some rural districts, the availability of a grand jury only twice a year makes unrealistic the provision of short time limits within which an indictment must be returned. This is not to say that prompt disposition of criminal cases cannot be achieved. It means only that the achieving of prompt disposition may require solutions which vary from district to district. Finding the best methods will require innovation and experimentation. To encourage this, the proposed draft mandates each district court to prepare a plan to achieve the prompt disposition of criminal cases in the district. The method prescribed for the development and approval of the district plans is comparable to that prescribed in the Jury Selection and Service Act of 1968, 28 U.S.C. § 1863(a).

Each plan shall include rules which specify time limits and a means for reporting the status of criminal cases. The appropriate length of the time limits is left to the discretion of the individual district courts. This permits each district court to establish time limits that are appropriate in light of its criminal caseload, frequency of grand jury meetings, and any other factors which affect the progress of criminal actions. Where local conditions exist which contribute to delay, it is contemplated that appropriate efforts will be made to eliminate those conditions. For example, experience in some rural districts demonstrates that grand juries can be kept on call thus eliminating the grand jury as a cause for prolonged delay. Where manpower shortage is a major cause for delay, adequate solutions will require congressional action. But the development and analysis of the district plans should disclose where manpower shortages exist; how large the shortages are; and what is needed, in the way of additional manpower, to achieve the prompt disposition of criminal cases.

The district court plans must contain special provision for prompt disposition of cases in which there is reason to believe that the pretrial liberty of a defendant poses danger to himself, to any other person, or to the community. Prompt disposition of criminal cases may provide an alternative to the pretrial detention of potentially dangerous defendants. See 116 Cong. Rec. S7291–97 (daily ed. May 18, 1970) (remarks of Senator Ervin). Prompt disposition of criminal cases in which the defendant is held in pretrial detention would ensure that the deprivation of liberty prior to conviction would be minimized.

Approval of the original plan and any subsequent modification must be obtained from a reviewing panel made up of one judge from the district submitting the plan (either the chief judge or another active judge appointed by him) and the members of the judicial council of the circuit. The makeup of this reviewing panel is the same as that provided by the Jury Selection and Service Act of 1968, 28

U.S.C. § 1863(a). This reviewing panel is also empowered to direct the modification of a district court plan.

The Circuit Court of Appeals for the Second Circuit recently adopted a set of rules for the prompt disposition of criminal cases. See 8 Cr.L. 2251 (Jan. 13, 1971). These rules, effective July 5, 1971, provide time limits for the early trial of high risk defendants, for court control over the granting of continuances, for criteria to control continuance practice, and for sanction against the prosecution or defense in the event of noncompliance with prescribed time limits.

1976 AMENDMENT

This amendment to rule 50(b) takes account of the enactment of The Speedy Trial Act of 1974, 18 U.S.C. §§ 3152–3156, 3161–3174. As the various provisions of the Act take effect, see 18 U.S.C. § 3163, they and the district plans adopted pursuant thereto will supplant the plans heretofore adopted under rule 50(b). The first such plan must be prepared and submitted by each district court before July 1, 1976. 18 U.S.C. § 3165(e)(1).

That part of rule 50(b) which sets out the necessary contents of district plans has been deleted, as the somewhat different contents of the plans required by the Act are enumerated in 18 U.S.C. § 3166. That part of rule 50(b) which describes the manner in which district plans are to be submitted, reviewed, modified and reported upon has also been deleted, for these provisions now appear in 18 U.S.C. § 3165(c) and (d).

Rule 51. Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

NOTES OF ADVISORY COMMITTEE ON RULES

1. This rule is practically identical with Rule 46 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. It relates to a matter of trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion. The corresponding civil rule has been construed in *Ulm* v. *Moore-McCormack Lines, Inc.*, 115 F.2d 492, C.C.A.2d, and *Bucy* v. *Nevada Construction Company*, 125 F.2d 213, 218, C.C.A.9th. See, also, Orfield, 22 Texas L.R. 194, 221. As to the method of taking objections to instructions to the jury, see Rule 30.

2. Many States have abolished the use of exceptions in criminal and civil cases. See, e.g., Cal. Pen. Code (Deering, 1941), sec. 1259; Mich. Stat. Ann. (Henderson, 1938), secs. 28.1046, 28.1053; Ohio Gen. Code Ann. (Page, 1938), secs. 11560, 13442-7; Oreg. Comp. Laws Ann. (1940), secs. 5–704, 26–1001.

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is a restatement of existing law, 28 U.S.C. former § 391 (second sentence): "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties"; 18 U.S.C. former § 556; "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *." A similar provision is found in Rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (b). This rule is a restatement of existing law, *Wiborg* v. *United States*, 163 U.S. 632, 658, 16 S.Ct. 1127, 1197, 2 cases, 41 L.Ed. 289; *Hemphill* v. *United States*, 112 F.2d 505, C.C.A.9th, reversed 312 U.S. 657, 61 S.Ct. 729, 85 L.Ed. 1106, conformed to 120 F.2d 115, certiorari denied 314 U.S. 627, 62 S.Ct. 111, 86 L.Ed. 503. Rule 27 of the Rules of the Supreme Court, 28 U.S.C. foll. § 354, provides that errors not specified will be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.

Rule 53. Regulation of Conduct in the Court Room

The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

NOTES OF ADVISORY COMMITTEE ON RULES

While the matter to which the rule refers has not been a problem in the Federal courts as it has been in some State tribunals, the rule was nevertheless included with a view to giving expression to a standard which should govern the conduct of judicial proceedings, Orfield, 22 Texas L.R. 194, 222–3; Robbins, 21 A.B.A.Jour. 301, 304. See, also, Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings (1937), 62 A.B.A. Rep 851, 862–865; (1932) 18 A.B.A.Jour. 762; (1926) 12 Id. 488; (1925) 11 Id. 64.

Rule 54. Application and Exception

(a) Courts. These rules apply to all criminal proceedings in the United States District Courts; in

the District Court of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.

(b) Proceedings.

(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) Offenses Outside a District or State. These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238.

(3) Peace Bonds. These rules do not alter the power of judges of the United States or of United States magistrates to hold to security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) Proceedings Before United States Magistrates. Proceedings involving misdemeanors before United States magistrates are governed by the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

(5) Other Proceedings. These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C., Chapter 403—Juvenile Delinquency—so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300–4305, 33 U.S.C. §§ 391–396, or to proceedings involving disputes between seamen under Revised Statutes, §§ 4079–4081, as amended, 22 U.S.C. §§ 256–258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325–327, 16 U.S.C. §§ 772–772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.

(c) Application of Terms. As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in an insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial decisions.

"Magistrate" includes a United States magistrate as defined in 28 U.S.C. §§ 631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.

"Oath" includes affirmations.

"Petty offense" is defined in 18 U.S.C. § 1(3).

"State" includes District of Columbia, Puerto Rico, territory and insular possession.

"United States magistrate" means the officer authorized by 28 U.S.C. §§ 631–639.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Apr. 9, 1956, eff. July 8, 1956; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1982, eff. Aug. 1, 1982; Oct. 12, 1984, Pub.L. 98–473, Title II, § 209(e), 98 Stat. 1987.)

Amendment of Subsec. (c)

Pub.L. 98–473, Title II, §§ 215(e), 235, Oct. 12, 1984, 98 Stat. 2016, 2031, provided that, effective Nov. 1, 1986, this rule is amended by amending the definition of "Petty offense" in subdivision (c) to read as follows: "'Petty offense' means a class B or C misdemeanor or an infraction.".

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a)(1). 1. The act of June 28, 1940 (54 Stat. 688; 18 U.S.C. former § 687 (now § 3771)), authorizing the Supreme Court to prescribe rules of criminal procedure for the district courts of the United States in respect to proceedings prior to and including verdict or finding of guilty or not guilty or plea of guilty, is expressly applicable to the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, Virgin Islands, the Supreme Courts of Hawaii and Puerto Rico, and the United States Court for China. This is likewise true of the act of February 24, 1933 (47 Stat. 904; 18 U.S.C. former § 688 (now § 3772)), authorizing the Supreme Court to prescribe rules in respect to proceedings after verdict or finding or after plea of guilty. In this respect these two statutes differ from the act of June 19, 1934 (48 Stat. 1064; 28 U.S.C. former §§ 723b, 723c (now § 2072)), authorizing the Supreme Court to prescribe rules of civil procedure. The last-mentioned Act comprises only district courts of the United States and the courts of the District of Columbia. The phrase "district courts of the United States" was held not to include district courts in the territories and insular possessions, *Mookini* v. *United States*, 303 U.S. 201, 58 S.Ct. 543, 82 L.Ed. 748, conformed to 95 F.2d 960. By subsequent legislation the Federal Rules of Civil Procedure were extended to the District Court of the United States for Hawaii and to appeals therefrom (act of June 19, 1939; 53 Stat. 841; 48 U.S.C. former § 646) and to the District Court of the United States for Puerto Rico and to appeals therefrom (act of February 12, 1940; 54 Stat. 22; 48 U.S.C. former § 873a).

2. While the specific reference in the rule to the District Court of the United States for the District of Columbia is probably superfluous, since that court has the same powers and exercises the same jurisdiction as other district courts of the United States in addition to such local powers and jurisdiction as have been conferred upon it by statute (D.C. Code, 1940, Title 11, § 305), nevertheless it was listed in the rule in view of the fact that the Federal Rules of Civil Procedure contain a somewhat similar provision (Rule 81(d), 28 U.S.C., Appendix).

3. The United States Court for China has been omitted from the rule in view of the fact that the court has recently been abolished with the abandonment by the United States of its extraterritorial jurisdiction in China.

4. Although, as indicated above, the rule-making power of the Supreme Court in respect to criminal cases extends to the Supreme Courts of Hawaii and Puerto Rico, the rules are not made applicable to those two courts, in view of the fact that they are purely local appellate courts having no appellate jurisdiction over the district courts of the United States in those territories. Alaska and Hawaii have dual systems of courts: local courts exercising purely local jurisdiction and United States district courts exercising Federal jurisdiction. The Supreme Court of each of the two territories hears appeals only from the local courts.

5. Alaska.—There is a district court for the Territory of Alaska consisting of four divisions, established on a territorial basis, 48 U.S.C. §§ 101, 101a. As the only court in the Territory, it acts in a dual capacity: it has jurisdiction over cases arising under the laws of the United States as well as those arising under local laws. Although a legislative rather than a constitutional court, it is, nevertheless, deemed a court of the United States and has the jurisdiction of district courts of the United States, 48 U.S.C. §§ 101, 101a; *Steamer Coquitlam* v. *United States*, 163 U.S. 346, 16 S.Ct. 1117, 41 L.Ed. 184; *McAllister* v. *United States*, 141 U.S. 174, 179, 11 S.Ct. 949, 35 L.Ed. 693; *Ex parte Krause*, 228 Fed. 547, 549, W.D. Wash. Criminal procedure is now regulated by acts of Congress, by the Alaska Code of Criminal Procedure (Alaska Comp. Laws, 1933, pp. 959–1018), and by rules promulgated by the district court.

6. Hawaii.—Hawaii has a dual system of courts. The United States District Court for the Territory of Hawaii, a legislative court, has the jurisdiction of district courts of the United States and proceeds therein "in the same manner as a district court," 48 U.S.C. former §§ 641, 642. In addition, there are circuit courts having jurisdiction over cases arising under local laws. Appeals from the circuit courts run to the Supreme Court of the Territory, 48 U.S.C. § 631. These rules are made applicable to the district court, but not to the local courts. The Federal Rules of Civil Procedure have been made applicable to the district court and to appeals therefrom, 48 U.S.C. former § 646.

7. Puerto Rico.—Puerto Rico has a dual system of courts. The District Court of the United States for Puerto Rico, a legislative court, has jurisdiction of all cases cognizable in the district courts of the United States and proceeds "In the same manner," 48 U.S.C. § 863.

In addition, there are local courts for the trial of cases arising under local law, appeals therefrom running to the Supreme Court of the Territory. These rules are made applicable to the district court, but not to the local courts. The Federal Rules of Civil Procedure, 28 U.S.C., Appendix, have been extended to the district court, 48 U.S.C. former § 873a.

8. Virgin Islands.—In the Virgin Islands there is a District Court of the Virgin Islands, a legislative court, consisting of two divisions and exercising both Federal and local jurisdiction, 48 U.S.C. §§ 1405z, 1406. Heretofore the rules of practice and procedure have been pre-

scribed "by law or ordinance or by rules and regulations of the district judge not inconsistent with law or ordinance," 48 U.S.C. § 1405z.

9. Canal Zone.—In the Canal Zone there is a United States District Court for the District of the Canal Zone, a legislative court, exercising both Federal and local jurisdiction, 48 U.S.C. former §§ 1344, 1345. Criminal procedure is regulated by the Code of Criminal Procedure of the Canal Zone (Canal Zone Code, Title 6; 48 Stat. 1122), and by rules of practice and procedure prescribed by the district judge, 48 U.S.C. former § 1344. There are no grand juries in the district, all prosecutions being instituted by information. In the light of these circumstances and because of the peculiar status of the Canal Zone and its quasi-military nature, these rules have been made applicable to its district court, only with respect to proceedings after verdict or finding of guilty or plea of guilty.

10. By order dated March 31, 1941, effective July 1, 1941, the Supreme Court extended the rules of practice and procedure after plea of guilty, verdict or finding of guilty, in criminal cases, to the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, and all subsequent proceedings in such cases in the United States circuit courts of appeals and in the Supreme Court of the United States, 312 U.S. 721.

Note to Subdivision (a)(2). 1. Rules 3, 4, and 5, supra, relate to proceedings before United States commissioners.

2. Justices and judges of the United States, as well as United States commissioners, may issue warrants and conduct proceedings as committing magistrates, 18 U.S.C. former § 591 (now § 3041) (Arrest and removal for trial); 9 Edmunds, Cyclopedia of Federal Procedure, 2d Ed., secs. 3800, 3819.

3. In the District of Columbia judges of the Municipal Court have authority to issue warrants and conduct proceedings as committing magistrates, D.C. Code, 1940, Title 11, secs. 602, 755. These proceedings are governed by these rules. The Municipal Court of the District of Columbia is also a local court for the trial of misdemeanors, but when so acting it is not a court of the United States. These rules, therefore, do not apply to such proceedings.

4. State and local judges and magistrates may issue warrants and act as committing magistrates in Federal cases, 18 U.S.C. former § 591 (now § 3041). Only a very small proportion of cases are brought before them, however, and then ordinarily only in an emergency. Since these judicial officers may not be familiar with Federal procedure, these rules have not been made applicable to such proceedings.

Note to Subdivision (b)(1). 1. Certain types of State criminal prosecutions, principally those in which defendant is an officer appointed under or acting by authority of a revenue law of the United States and is prosecuted on account of an act done under color of his office, are removable to a Federal court on defendant's motion, 28 U.S.C. former § 74 (now §§ 1443, 1446, 1447) (Removal of suits from State courts; causes against persons denied civil rights); former sec. 76 (now §§ 1442, 1446, 1447) (Removal of suits from State courts; suits and prosecutions against revenue officers). In such cases the Federal court applies the substantive law of the State, but follows Federal procedure; *State of Tennessee* v. *Davis*, 100 U.S. 257, 25 L.Ed. 648; *Carter* v. *Tennessee*, 18 F.2d 850, C.C.A.6th; *Miller* v. *Kentucky*, 40 F.2d 820, C.C.A.6th. See also, *State of Maryland* v. *Soper*, 270 U.S. 9, 46 S.Ct. 185, 70 L.Ed. 449. The rule is, therefore, a restatement of existing law, except that it does not affect whatever power the State prosecutor may have as to dismissal.

2. The rule does not affect the mode of removing a case from a State to a Federal court and leaves undisturbed the statutes governing this matter, 28 U.S.C. former §§ 74–76 (now §§ 1442, 1443, 1446, 1447).

Note to Subdivision (b)(2). This rule should be read in conjunction with Rule 18, which provides that "Except as otherwise permitted by statute or by these rules, the prosecution shall be held in a district in which the offense was committed * * *".

Note to Subdivision (b)(4). United States commissioners specially designated for that purpose by the court by which they are appointed have trial jurisdiction over petty offenses committed on Federal reservations if the defendant waives his right to be tried in the district court and consents to be tried before the commissioner. Act of October 9, 1940, 54 Stat. 1058, 18 U.S.C. former § 576 (now § 3401). A petty offense is an offense the penalty for which does not exceed confinement in a common jail without hard labor for a period of six months or a fine of $500, or both, 18 U.S.C. former § 541 (now § 1). Appeals from convictions by commissioners lie to the district court, 18 U.S.C. former § 576a (now § 3402). These rules do not apply to trials before United States commissioners in such cases, since rules of procedure and practice in such matters were specially prescribed by the Supreme Court on January 6, 1941, 311 U.S. 733 et seq. The substantive law applicable in such cases with respect to offenses other than so-called Federal offenses is governed by 18 U.S.C. former § 468 (now § 13) (Laws of States adopted for punishing wrongful acts; effect of repeal). In addition, National Park commissioners have limited trial jurisdiction with respect to offenses committed in National Parks. Trials before commissioners in such cases are not governed by these rules, although when a National Park commissioner conducts a proceeding as a committing magistrate, these rules are applicable.

Among the statutes relating to jurisdiction of and proceedings before National Park commissioners are the following:

U.S.C. Title 16:

§ 10 (Arrests by employees of park service for violation of laws and regulations)

§ 10a (Arrests by employees for violation of regulations made under § 9a)

§ 27 [now 28 U.S.C. §§ 131, 631, 632] (Yellowstone National Park; commissioner; jurisdiction and powers)

§ 66 [now 28 U.S.C. §§ 631, 632] (Yosemite and Sequoia National Parks; commissioners; appointment; jurisdiction)

§ 70 [now 18 U.S.C. §§ 3041, 3141; 18 U.S.C., App., Rules 4, 5(c), 9] (Same; arrests by commissioners for certain offenses; holding persons arrested for trial; bail)

§ 101 [now 18 U.S.C. §§ 3041, 3141; 18 U.S.C., App., Rule 4; 28 U.S.C., App., Rule 4] (Mount Rainier National Park; commissioner; arrest; bail)
§ 102 [now 18 U.S.C. § 3053; 18 U.S.C., App., Rule 4; 28 U.S.C., App., Rule 4] (Same; commissioner; direction of process of; arrests by other officers)
§ 117b [now 18 U.S.C. § 13] (Mesa Verde National Park; application of Colorado laws to offenses)
§ 117f [now 18 U.S.C. §§ 3041, 3141; 18 U.S.C., App., Rules 4, 5(c), 9] (Same; criminal offenses not covered by section 117c; jurisdiction of commissioner)
§ 117g [now 18 U.S.C. § 3053; 18 U.S.C., App., Rule 4; 28 U.S.C., App., Rule 4] (Same; process to whom issued; arrests without process)
§ 129 [now 28 U.S.C. §§ 631, 632] (Crater Lake National Park; commissioner; appointment; powers and duties)
§ 130 [now 18 U.S.C. §§ 3041, 3141; 18 U.S.C., App., Rules 4, 5(c), 9] (Same; commissioner; arrests by; bail)
§ 131 [18 § 3053; 18 Rule 4; 28 Rule 4] (Same; commissioner; direction of process; arrest without process)
§ 172 [28 §§ 631, 632] (Glacier National Park; commissioner; jurisdiction; powers and duties)
§ 173 [18 §§ 3041, 3141; 18 Rules 4, 5(c), 9] (Same; commissioner; arrest of offenders, confinement, and bail)
§ 174 [18 § 3053; 28 Rule 4] (Same; commissioner; process directed to marshal; arrest without process)
§ 198b [18 § 13] (Rocky Mountain National Park; punishment of offenses; Colorado laws when followed)
§ 198e [28 §§ 631, 632] (Same; United States Commissioner; appointment; jurisdiction; issuing process; appeals; rules of procedure)
§ 198f [18 §§ 3041, 3141; 18 Rules 4, 5(c), 9] (Same; United States Commissioner; arrest of persons for offenses not covered by section 198c; bail)
§ 198g [18 § 3053; 18 Rule 4; 28 Rule 4] (Same; United States Commissioner; process to whom directed; arrest without process)
§ 204b [18 § 13] (Lassen Volcanic National Park; application of California laws to offenses)
§ 204e [28 §§ 631, 632] (Same; United States Commissioner; appointment; jurisdiction of offenses; appeals; rules of procedure)
§ 204f [18 §§ 3041, 3141; 18 Rules 4, 5(c), 9] (Same; criminal offenses not covered by section 204c; jurisdiction of commissioner)
§ 204g [18 § 3053; 18 Rule 4; 28 Rule 4] (Same; process to whom issued; arrests without process)
§ 376 [28 § 632] (Hot Springs National Park; prosecutions for violations of law or rules and regulations)
§ 377 [18 §§ 3041, 3141; 18 Rules 4, 5(c), 9] (Same; prosecutions for other offenses)
§ 378 [18 § 3053; 18 Rule 4; 28 Rule 4] (Same; process directed to marshal; arrests by others)
§ 381 [18 § 3041] (Same; execution of sentence on conviction)
§ 382 [18 § 3041] (Same; imprisonment for nonpayment of fines or costs)
§ 395b [18 § 13] (Hawaii National Park; application of Hawaiian laws to offenses)
§ 395e [28 §§ 631, 632] (Same; United States Commissioner; appointment; jurisdiction of offenses; appeals; rules of procedure; acting commissioners)
§ 395f [18 §§ 3041, 3141; 18 Rules 4, 5(c), 9] (Same; criminal offenses not covered by section 395c; jurisdiction of commissioner)
§ 395g [18 § 3053; 18 Rule 4] (Same; process to whom issued; arrests without process)
§ 403c–1 (Shenandoah National Park and Great Smoky Mountains National Park; notice of assumption of police jurisdiction over Shenandoah Park by United States; exceptions)
§ 403c–5 [28 §§ 631, 632] (Same; United States Commissioner; appointment; jurisdiction of offenses; appeals; rules of procedure)
§ 403c–6 [28 § 632] (Same; jurisdiction of other commissioners)
§ 403c–7 [18 §§ 3041, 3141; 18 Rules 4, 5(c), 9] (Same; commissioner's jurisdiction of offenses not covered by section 403c–2)
§ 403c–8 [18 § 3053; 18 Rule 4; 28 Rule 4] (Same; process to whom directed, arrest without process)
§ 415 (National Military Parks; arrest and prosecution of offenders)

Note to Subdivision (b)(5). 1. Foreign extradition proceedings are governed by the following statutes:
U.S.C. Title 18 former:
§ 651 [§ 3184] (Fugitives from foreign country)
§ 652 [§ 3185] (Fugitives from country under control of United States)
§ 653 [§ 3186] (Surrender of fugitive)
§ 654 [§ 3188] (Time allowed for extradition)
§ 655 [§ 3190] (Evidence on hearing)
§ 656 [§ 3191] (Witnesses for indigent defendants)
§ 657 [§ 3189] (Place and character of hearing)
§ 658 [§ 3181] (Continuance of provisions limited)
§ 659 [§ 3192] (Protection of accused)
§ 660 [§ 3193] (Agent receiving offenders; powers)

Interstate rendition or extradition proceedings are governed by the following statutes:
U.S.C. Title 18 former:
§ 662 [§§ 3182, 3195] (Fugitives from State or Territory)
§ 662c [§§ 752, 3183, 3195] (Fugitives from State or Territory; arrest and removal)
§ 662d [§§ 3187, 3195] (Fugitives from State or Territory; provisional arrest and detention)

2. Proceedings relating to forfeiture of property used in connection with a violation of a statute of the United States are governed by various statutes, among which are following:
U.S.C. Title 16:
§ 26 (Yellowstone Park; regulations for hunting and fishing in; punishment for violation; forfeitures)
§ 65 (Yosemite and Sequoia National Parks; seizure and forfeiture of guns, traps, teams, horses, and so forth)

§ 99 (Mount Rainier National Park; protection of game and fish; forfeitures of guns, traps, teams, and so forth)
§ 117d (Mesa Verde National Park; forfeiture of property used for unlawful purpose)
§ 128 (Crater Lake National Park; hunting and fishing; forfeitures or seizure of guns, traps, teams, etc., for violating regulations)
§ 171 (Glacier National Park; hunting and fishing; forfeitures and seizures of guns, traps, teams, and so forth)
§ 198d (Rocky Mountain National Park; forfeiture of property used in commission of offenses)
§ 204d (Lassen Volcanic National Park; forfeiture of property used for unlawful purposes)
§ 635 (Importing illegally taken skins; forfeiture)
§ 706 (Arrests; search warrants)
§ 727 (Upper Mississippi River Wild Life and Fish Refuge; powers of employees of Department of the Interior; searches and seizures)
§ 772e (Penalties and forfeitures)
U.S.C. Title 18 former:
§ 286 [§ 492] (Forfeiture of counterfeit obligations, etc.; failure to deliver)
§ 645 [§ 3611] (Confiscation of firearms possessed by convicted felons)
§ 646 [§ 3617] (Remission or mitigation of forfeitures under liquor laws; possession pending trial)
§ 647 [§ 3616] (Use of confiscated motor vehicles)
U.S.C. Title 19:
§ 483 [§ 1595a] (Forfeitures; penalty for aiding unlawful importation)
§ 1592 (Fraud; penalty against goods)
§ 1602 (Seizure; report to collector)
§ 1603 (Seizure; collector's reports)
§ 1604 (Seizure; prosecution)
§ 1605 (Seizure; custody)
§ 1606 (Seizure; appraisement)
§ 1607 (Seizure; value $1,000 or less)
§ 1608 (Seizure; claims; judicial condemnation)
§ 1609 (Seizure; summary of forfeiture and sale)
§ 1610 (Seizure; value more than $1,000)
§ 1611 (Seizure; sale unlawful)
§ 1612 (Seizure; summary sale)
§ 1613 (Disposition of proceeds of forfeited property)
§ 1614 (Release of seized property)
§ 1615 (Burden of proof in forfeiture proceedings)
§ 1703 (Seizure and forfeiture of vessels)
§ 1705 (Destruction of forfeited vessel)
U.S.C. Title 21:
§ 334 (Seizure)
§ 337 (Proceedings in name of United States; provision as to subpenas)
U.S.C. Title 22:
§ 401 (Seizure of war materials intended for unlawful export generally; forfeiture)
§ 402 (Seizure of war materials intended for unlawful export generally; warrant for detention of seized property)
§ 403 (Seizure of war materials intended for unlawful export generally; petition for restoration of seized property)
§ 404 (Seizure of war materials intended for unlawful export generally; libel and sale of seized property)
§ 405 (Seizure of war materials intended for unlawful export generally; method of trial; bond for redelivery)
§ 406 (Seizure of war materials intended for unlawful export generally; sections not to interfere with foreign trade)
U.S.C. Title 26:
§ 3116 [§ 7302] (Forfeitures and seizures)

3. Collection of fines and penalties is accomplished in the same manner as the collection of a civil judgment. See Rule 69(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix. For mode of discharging indigent convicts imprisoned for non-payment of fine, see 18 U.S.C. former § 641 (now § 3569).

4. The Federal Juvenile Delinquency Act, 18 U.S.C. former §§ 921–929 (now §§ 5031–5037), authorizes prosecution of a juvenile delinquent on the charge of juvenile delinquency, if the juvenile consents to this procedure. In such cases the court may be convened at any time and place, in chambers or otherwise, and the trial is without a jury. The purpose of excepting proceedings under the act is to make inapplicable to them the requirement of an arraignment in open court (Rule 10) and other similar provisions.

5. As habeas corpus proceedings are regarded as civil proceedings, they are not governed by these rules. The procedure in such cases is prescribed by 28 U.S.C. former §§ 451–466 (now §§ 2241–2243, 2251–2253). Appeals in habeas corpus proceedings are governed by the Federal Rules of Civil Procedure (Rule 81(a)(2) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix).

Note to Subdivision (c). 1. This rule is analogous to Rule 81(e) of the Federal Rules of Civil Procedure, 28 U.S.C. following § 2072.

2. 1 U.S.C. §§ 1–6, containing general rules of construction, should be read in conjunction with this rule.

3. In connection with the definition of "attorney for the Government", see the following statutes:
U.S.C. Title 5:
§ 291 (Establishment of Department)
§ 293 (Solicitor General)
§ 294 (Assistant to Attorney General)
§ 295 (Assistant Attorneys General)
§ 309 (Conduct and argument of cases by Attorney General and Solicitor General)
§ 310 (Conduct of legal proceedings)
§ 311 (Performance of duty by officers of Department)
§ 312 [28 §§ 503, 507, 508] (Counsel to aid district attorneys)
§ 315 (Appointment and oath of special attorneys or counsel)
U.S.C. Title 28 former:
§ 481 [§ 501] (District attorneys)
§ 483 [§ 502] (Assistant district attorneys)
§ 485 [§ 507] (District attorneys; duties)

4. The last sentence of this rule has particular reference to 18 U.S.C. former § 682 (now § 3731). (Appeals; on behalf of the United States; rules of practice and procedure), which authorizes the United States to appeal in criminal cases from a decision on a motion to quash, a

demurrer or a special plea in bar, if the defendant has not been placed in jeopardy. It is intended that the right of the Government to appeal in such cases should not be affected as the result of the substitution of a motion under Rule 12 for a demurrer, motion to quash and a special plea in bar. The rule is equally applicable to any other statute employing the same terminology.

1948 AND 1956 AMENDMENTS

To conform to the nomenclature of revised Title 28 with respect to district courts and courts of appeals (28 U.S.C. §§ 132(a), 43(a); to eliminate special reference to the district courts for the District of Columbia, Hawaii and Puerto Rico which are now United States district courts for all purposes (28 U.S.C. §§ 88, 91, 119, 132, 133, 451), and to eliminate special reference to the court of appeals for the District of Columbia which is now a United States court of appeals for all purposes (28 U.S.C. §§ 41, 43).

The amendment to paragraph (1) is to incorporate nomenclature of Revised Title 28 and in paragraphs (2), (3), (4), and (5) to insert proper reference to Titles 18 and 28 in place of repealed acts.

Under revised Title 28 the justices of the United States Court of Appeals and District Court for the District of Columbia become circuit and district judges (see 28 U.S.C. §§ 44, 133) and the use of the descriptive phrase "senior circuit judge" is abandoned in favor of the title "chief judge" in all circuits including the District of Columbia.

1966 AMENDMENT

Subdivision (a). The first change reflects the granting of statehood to Alaska. The second change conforms to Section 3501 of the Canal Zone Code.

Subdivision (b). The change is made necessary by the new provision in Rule 20(d).

1972 AMENDMENT

Subdivisions (a) and (b) are amended to delete the references to "Commissioners" and to substitute, where appropriate, the phrase "United States magistrates."

Subdivision (a)(2) is deleted. In its old form it makes reference to "rules applicable to criminal proceedings before commissioners," which are now replaced by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates (1971). Rule 1 of the magistrates' rules provides that they are applicable to cases involving "minor offenses" as defined in 18 U.S.C. § 3401 "before United States magistrates." Cases involving "minor offenses" brought before a judge of the district court will be governed by the Rules of Criminal Procedure for the United States District Courts.

The last sentence of old subdivision (a)(2) is stricken for two reasons: (1) Whenever possible, cases should be brought before a United States magistrate rather than before a state or local judicial officer authorized by 18 U.S.C. § 3041. (2) When a state or local judicial officer is involved, he should conform to the federal rules.

Subdivision (b)(4) makes clear that minor offense cases before United States magistrates are governed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates (1971). See rule 1 of the magistrates' rules.

In subdivision (b)(5) the word "civil" is added before the word "forfeiture" to make clear that the rules *do* apply to criminal forfeitures. This is clearly the intention of Congress. See Senate Report No. 91–617, 91st Cong., 1st Sess., Dec. 16, 1969, at 160:

Subsection (a) provides the remedy of criminal forfeiture. Forfeiture trials are to be governed by the Fed. R. Crim. P. But see Fed. R. Crim. P. 54(b)(5).

Subdivision (c) is amended to list the defined terms in alphabetical order to facilitate the use of the rule. There are added six new definitions.

"Federal magistrate" is a phrase to be used whenever the rule is intended to confer authority on any federal judicial officer including a United States magistrate.

"Judge of the United States" is a phrase defined to include district court, court of appeals, and supreme court judges. It is used in the rules to indicate that only a judge (not to include a United States magistrate) is authorized to act.

"Magistrate" is a term used when both federal and state judicial officers may be authorized to act. The scope of authority of state or local judicial officers is clarified by the enumeration of those rules (3, 4, and 5) under which they are authorized to act.

"United States magistrate" is a phrase which refers to the federal judicial officer created by the Federal Magistrates Act (28 U.S.C. §§ 631–639).

Also added are cross references to the statutory definitions of "minor offense" and "petty offense."

1982 AMENDMENT

Subdivision (a). The amendment of subdivision (a) conforms to 48 U.S.C. § 1694(c), which provides that "the rules heretofore or hereafter promulgated and made effective by the Congress or the Supreme Court of the United States pursuant to Titles 11, 18, and 28 shall apply to the District Court for the Northern Mariana Islands and appeals therefrom where appropriate, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263)." The reference is to the "Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America." Article IV of the covenant provides that except when exercising "the jurisdiction of a district court of the United States," the District Court will be considered a court of the Northern Mariana Islands for the purposes of determining the requirements of indictment by grand jury or trial by jury." Article V provides that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except when required by local law."

Subdivision (b)(4). This change is necessitated by the recent amendment of 18 U.S.C. § 3401 by the Federal Magistrate Act of 1979.

Subdivision (c). The first amendment to subdivision (c) conforms to 48 U.S.C. § 1694(c), which states: "The terms 'attorney for the government' and 'United States Attorney' as used in the Federal Rules of Criminal Procedure (Rule 54(c)) shall, when applicable to cases arising under the laws of the Northern Mariana Islands, include the attorney general of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein."

The second amendment to subdivision (c) eliminates any reference to minor offenses. By virtue of the recent amendment of 18 U.S.C. § 3401 by the Federal Magistrate Act of 1979, the term "minor offense" is no longer utilized in the statute. It is likewise no longer used in these rules. See amendments to Rules 5(b) and 9(d).

Rule 55. Records

The clerk of the district court and each United States magistrate shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1983, eff. Aug. 1, 1983.)

NOTES OF ADVISORY COMMITTEE ON RULES

The Federal Rules of Civil Procedure Rule 79, 28 U.S.C., Appendix, prescribed in detail the books and records to be kept by the clerk in civil cases. Subsequently to the effective date of the civil rules, however, the act establishing the Administrative Office of the United States Courts became law (act of August 7, 1939; 53 Stat. 1223; 28 U.S.C. former §§ 444–450 (now §§ 332–333, 456, 601–610)). One of the duties of the Director of that Office is to have charge, under the supervision and direction of the Conference of Senior Circuit Judges, of all administrative matters relating to the offices of the clerks and other clerical and administrative personnel of the courts, 28 U.S.C. former § 446 (now §§ 604, 609). In view of this circumstance it seemed best not to prescribe the records to be kept by the clerks of the district courts and by the United States commissioners, in criminal proceedings, but to vest the power to do so in the Director of the Administrative Office of the United States Courts with the approval of the Conference of Senior Circuit Judges.

1948 AMENDMENT

To incorporate nomenclature provided for by Revised Title 28 U.S.C., § 331.

1966 AMENDMENT

Rule 37(a)(2) provides that for the purpose of commencing the running of the time for appeal a judgment or order is entered "when it is entered in the criminal docket." The sentence added here requires that such a docket be kept and that it show the dates on which judgments or orders are entered therein. Cf. Civil Rule 79(a).

1983 AMENDMENT

The Advisory Committee Note to original Rule 55 observes that, in light of the authority which the Director and Judicial Conference have over the activities of clerks, "it seems best not to prescribe the records to be kept by clerks." Because of current experimentation with automated record-keeping, this approach is more appropriate than ever before. The amendment will make it possible for the Director to permit use of more sophisticated record-keeping techniques, including those which may obviate the need for a "criminal docket" book. The reference to the Judicial Conference has been stricken as unnecessary. See 28 U.S.C. § 604.

Rule 56. Courts and Clerks

The district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. The first sentence of this rule is substantially the same as Rule 77(a) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, except that it is applicable to circuit courts of appeals as well as to district courts.

2. In connection with this rule, see 28 U.S.C. former § 14 (Monthly adjournments for trial of criminal causes) and 28 U.S.C. former § 15 (now § 141) (Special terms). These sections "indicate a policy of avoiding the hardships consequent upon a closing of the court during vacations," *Abbott* v. *Brown*, 241 U.S. 606, 611, 36 S.Ct. 689, 60 L.Ed. 1199.

3 The second sentence of the rule is identical with the first sentence of Rule 77(c) of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

4. The term "legal holidays" includes Federal holidays as well as holidays prescribed by the laws of the State where the clerk's office is located.

1948 AMENDMENT

To incorporate nomenclature provided for by Revised Title 28, U.S.C. § 43(a).

1966 AMENDMENT

The change is in conformity with the changes made in Rule 45. See the similar changes in Civil Rule 77(c) made effective July 1, 1963.

1968 AMENDMENT

The provisions relating to courts of appeals are included in Rule 47 of the Federal Rules of Appellate Procedure.

1971 AMENDMENT

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 45(a).

Rule 57. Rules of Court

(a) Rules by District Courts. Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Dec. 4, 1967, eff. July 1, 1968.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). This rule is substantially a restatement of 28 U.S.C. former § 731 (now § 2071) (Rules of practice in district courts). A similar provision is found in Rule 83 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (b). 1. One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever. The Federal Rules of Civil Procedure, 28 U.S.C., Appendix, have been held to repeal the Conformity Act, 28 U.S.C. former § 724, *Sibbach* v. *Wilson*, 312 U.S. 1, 10, 61 S.Ct. 422, 85 L.Ed. 479.

2. While the rules are intended to constitute a comprehensive procedural code for criminal cases in the Federal courts, nevertheless it seemed best not to endeavor to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them, either by local rules or by usage. Among such matters are the mode of impaneling a jury, the manner and order of interposing challenges to jurors, the manner of selecting the foreman of a trial jury, the matter of sealed verdicts, the order of counsel's arguments to the jury, and other similar details.

1948 AMENDMENT

To incorporate nomenclature provided for by Revised Title 28, U.S.C., § 43(a).

1968 AMENDMENT

The provisions relating to the court of appeals are included in Rule 47 of the Federal Rules of Appellate Procedure.

[Rule 58. Forms.] (Abrogated Apr. 28, 1983, Eff. Aug. 1, 1983)

Rule 58 and the Appendix of Forms are unnecessary and have been abrogated. Forms of indictment and information are made available to United States Attorneys' offices by the Department of Justice. Forms used by the courts are made available by the Director of the Administrative Office of the United States Courts.

Rule 59. Effective Date

These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is based on act of June 29, 1940 (54 Stat. 688; 18 U.S.C. former § 687 (now § 3771)). It is substantially the same as Rule 86 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Rule 60. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is similar to Rule 85 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, which reads as follows:

These rules may be known and cited as the Federal Rules of Civil Procedure.

APPENDIX OF FORMS [ABROGATED]

Forms 1 to 25—Abrogated, Apr. 28, 1983, eff. Aug. 1, 1983. Forms 26 and 27—Abrogated, Dec. 4, 1967, eff. July 1, 1968.

Rule 58 and the Appendix of Forms are unnecessary and have been abrogated. Forms of indictment and information are made available to United States Attorneys' offices by the Department of Justice. Forms used by the courts are made available by the Director of the Administrative Office of the United States Courts.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Effective February 1, 1977

As amended to January 1, 1985

Rule
1. Scope of Rules.
2. Petition.
3. Filing Petition.
4. Preliminary Consideration by Judge.
5. Answer; Contents.
6. Discovery.
7. Expansion of Record.
8. Evidentiary Hearing.
9. Delayed or Successive Petitions.
10. Powers of Magistrates.
11. Federal Rules of Civil Procedure; Extent of Applicability.

APPENDIX OF FORMS

Model form for use in applications for habeas corpus under 28 U.S.C. § 2254.

Model form for use in 28 U.S.C. § 2254 cases involving a Rule 9 issue.

ORDERS OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES GOVERNING CASES IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2254 OF TITLE 28, UNITED STATES CODE

ORDER OF APRIL 26, 1976

1. That the rules and forms governing proceedings in the United States District Courts under Section 2254 and Section 2255 of Title 28, United States Code, as approved by the Judicial Conference of the United States be, and they hereby are, prescribed pursuant to Section 2072 of Title 28, United States Code and Sections 3771 and 3772 of Title 18, United States Code.

2. That the aforementioned rules and forms shall take effect August 1, 1976, and shall be applicable to all proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding would not be feasible or would work injustice.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned rules and forms governing Section 2254 and Section 2255 proceedings to the Congress in accordance with the provisions of Section 2072 of Title 28 and Sections 3771 and 3772 of Title 18, United States Code.

CONGRESSIONAL ACTION ON PROPOSED RULES AND FORMS GOVERNING PROCEEDING UNDER 28 U.S.C. §§ 2254 and 2255

Pub.L. 94-349, § 2, July 8, 1976, 90 Stat. 822, provided: "That, notwithstanding the provisions of section 2072 of title 28 of the United States Code, the rules and forms governing section 2254 cases in the United States district courts and the rules and forms governing section 2255 proceedings in the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until thirty days after the adjournment sine die of the 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier."

Pub.L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

ORDER OF APRIL 30, 1979

1. That Rule 10 of the Rules Governing Proceedings in the United States District Courts on application under Section 2254 of Title 28, United States Code, be, and hereby is, amended to read as follows:

[See text of Rule 10 below]

2. That Rules 10 and 11 of the Rules Governing Proceedings in the United States District Courts on a motion under Section 2255 of Title 28, United States Code, be, and they hereby are, amended to read as follows:

Rule 10. Powers of magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.

Rule 11. Time for appeal

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

ORDER OF APRIL 28, 1982

1. That the rules and forms governing proceedings in the United States district courts under Section 2254 and Section 2255 of Title 28, United States Code, be, and they hereby are, amended by including therein an amendment to Rule 2(c) of the rules for Section 2254 cases, an amendment to Rule 2(b) of the rules for Section 2255 proceedings, and amendments to the model forms for use in applications under Section 2254 and motions under Section 2255, as hereinafter set forth:

[See amendments made thereby under: Rule 2 and Forms for Habeas Corpus Applications and Rule 9 Issues, Post; and Rule 2 and Forms for Motions and Rule 9 Issue Motions of Rules Governing 28 U.S.C. § 2255 Proceedings, set out following Rule 35 of Federal Rules of Criminal Procedure, Ante.]

2. That the aforementioned amendments shall take effect August 1, 1982, and shall be applicable to all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned amendments to the Congress in accordance with Section 2072 of Title 28 and Sections 3771 and 3772 of Title 18, United States Code.

Rule 1. Scope of Rules

(a) Applicable to cases involving custody pursuant to a judgment of a state court. These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

(b) Other situations. In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

ADVISORY COMMITTEE NOTE

Rule 1 provides that the habeas corpus rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973). Whether the rules ought to apply to other situations (*e.g.*, person in active military service, *Glazier* v. *Hackel*, 440 F.2d 592 (9th Cir. 1971); or a reservist called to active duty but not reported, *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968)) is left to the discretion of the court.

The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. § 2241(c) provides that the "writ of habeas corpus shall not extend to a prisoner unless * * * (h)e is *in custody* in violation of the Constitution." 28 U.S.C. § 2254 deals specifically with state custody, providing that habeas corpus shall apply only "in behalf of a person in custody pursuant to a judgment of a state court * * *."

In *Preiser* v. *Rodriguez*, *supra*, the court said: "It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484.

Initially the Supreme Court held that habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. *McNally* v. *Hill*, 293 U.S. 131 (1934). This was changed in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), in which the court held that habeas corpus was a proper way to attack a consecutive sentence to be served in the future, expressing the view that consecutive sentences resulted in present custody under both judgments, not merely the one imposing the first sentence. This view was expanded in *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), to recognize the propriety of habeas corpus in a case in which petitioner was in custody when the petition had been originally filed but had since been unconditionally released from custody.

See also *Preiser* v. *Rodriguez*, 411 U.S. at 486 et seq.

Since *Carafas*, custody has been construed more liberally by the courts so as to make a § 2255 motion or habeas corpus petition proper in more situations. "In custody" now includes a person who is: on parole, *Jones* v. *Cunningham*, 371 U.S. 236 (1963); at large on his own recognizance but subject to several conditions pending execution of his sentence, *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973); or released on bail after conviction pending final disposition of his case, *Lefkowitz* v. *Newsome*, 95 S.Ct. 886 (1975). See also *United States* v. *Re*, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967) (on probation); *Walker* v. *North Carolina*, 262 F.Supp. 102 (W.D. N.C. 1966), aff'd per curiam, 372 F.2d 129 (4th Cir.), cert. denied, 388 U.S. 917 (1967) (recipient of a conditionally suspended sentence); *Burris* v. *Ryan*, 397 F.2d 553 (7th Cir. 1968); *Marden* v. *Purdy*, 409 F.2d 784 (5th Cir. 1969) (free on bail); *United States ex rel. Smith* v. *Dibella*, 314 F.Supp. 446 (D.Conn. 1970) (release on own recognizance); *Choung* v. *Califor-*

nia, 320 F.Supp. 625 (E.D.Cal. 1970) (federal stay of state court sentence); *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971) (subject to parole detainer warrant); *Capler* v. *City of Greenville*, 422 F.2d 299 (5th Cir. 1970) (released on appeal bond); *Glover* v. *North Carolina*, 301 F.Supp. 364 (E.D.N.C. 1969) (sentence served, but as convicted felon disqualified from engaging in several activities).

The courts are not unanimous in dealing with the above situations, and the boundaries of custody remain somewhat unclear. In *Morgan* v. *Thomas*, 321 F.Supp. 565 (S.D.Miss. 1970), the court noted:

> It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is synonymous with restraint of liberty. The real question is how much restraint of one's liberty is necessary before the right to apply for the writ comes into play. * * *
>
> It is clear however, that something more than moral restraint is necessary to make a case for habeas corpus.

321 F.Supp. at 573

Hammond v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968), reviewed prior "custody" doctrine and reaffirmed a generalized flexible approach to the issue. In speaking about 28 U.S.C. § 2241, the first section in the habeas corpus statutes, the court said:

> While the language of the Act indicates that a writ of habeas corpus is appropriate only when a petitioner is "in custody," * * * the Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." * * * And, recent Supreme Court decisions have made clear that "[i]t [habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." * * * "[B]esides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."

398 F.2d at 710–711

There is, as of now, no final list of the situations which are appropriate for habeas corpus relief. It is not the intent of these rules or notes to define or limit "custody."

It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement (not related to the propriety of the custody itself), can better be handled by other means such as 42 U.S.C. § 1983 and other related statutes. In *Wilwording* v. *Swanson*, 404 U.S. 249 (1971), the court treated a habeas corpus petition by a state prisoner challenging the conditions of confinement as a claim for relief under 42 U.S.C. § 1983, the Civil Rights Act. Compare *Johnson* v. *Avery*, 393 U.S. 483 (1969).

The distinction between duration of confinement and conditions of confinement may be difficult to draw. Compare *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), with *Clutchette* v. *Procunier*, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (1975).

Rule 2. Petition

(a) Applicants in present custody. If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

(b) Applicants subject to future custody. If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

(c) Form of petition. The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(d) Petition to be directed to judgments of one court only. A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

(e) Return of insufficient petition. If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

(As amended Pub.L. 94–426, § 2(1), (2), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

ADVISORY COMMITTEE NOTE

Rule 2 describes the requirements of the actual petition, including matters relating to its form, contents, scope, and sufficiency. The rule provides more

specific guidance for a petitioner and the court than 28 U.S.C. § 2242, after which it is patterned.

Subdivision (a) provides that an applicant challenging a state judgment, pursuant to which he is presently in custody, must make his application in the form of a petition for a writ of habeas corpus. It also requires that the state officer having custody of the applicant be named as respondent. This is consistent with 28 U.S.C. § 2242, which says in part, "[Application for a writ of habeas corpus] shall allege * * * the name of the person who has custody over [the applicant] * * *." The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated (*Sanders* v. *Bennett*, 148 F.2d 19 (D.C.Cir. 1945)) or the chief officer in charge of state penal institutions.

Subdivision (b) prescribes the procedure to be used for a petition challenging a judgment under which the petitioner will be subject to custody in the future. In this event the relief sought will usually not be released from present custody, but rather for a declaration that the judgment being attacked is invalid. Subdivision (b) thus provides for a prayer for "appropriate relief." It is also provided that the attorney general of the state of the judgment as well as the state officer having actual custody of the petitioner shall be named as respondents. This is appropriate because no one will have custody of the petitioner in the state of the judgment being attacked, and the habeas corpus action will usually be defended by the attorney general. The attorney general is in the best position to inform the court as to who the proper party respondent is. If it is not the attorney general, he can move for a substitution of party.

Since the concept of "custody" requisite to the consideration of a petition for habeas corpus has been enlarged significantly in recent years, it may be worth-while to spell out the various situations which might arise and who should be named as respondent(s) for each situation.

(1) The applicant is in jail, prison, or other actual physical restraint due to the state action he is attacking. The named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).

(2) The applicant is on probation or parole due to the state judgment he is attacking. The named respondents shall be the particular probation or parole officer responsible for supervising the applicant, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.

(3) The applicant is in custody in any other manner differing from (1) and (2) above due to the effects of the state action he seeks relief from. The named respondent should be the attorney general of the state wherein such action was taken.

(4) The applicant is in jail, prison, or other actual physical restraint but is attacking a state action which will cause him to be kept in custody in the future rather than the government action under which he is presently confined. The named respondents shall be the state or federal officer who has official custody of him at the time the petition is filed and the attorney general of the state whose action subjects the petitioner to future custody.

(5) The applicant is in custody, although not physically restrained, and is attacking a state action which will result in his future custody rather than the government action out of which his present custody arises. The named respondent(s) shall be the attorney general of the state whose action subjects the petitioner to future custody, as well as the government officer who has present official custody of the petitioner if there is such an officer and his identity is ascertainable.

In any of the above situations the judge may require or allow the petitioner to join an additional or different party as a respondent if to do so would serve the ends of justice.

As seen in rule 1 and paragraphs (4) and (5) above, these rules contemplate that a petitioner currently in federal custody will be permitted to apply for habeas relief from a state restraint which is to go into effect in the future. There has been disagreement in the courts as to whether they have jurisdiction of the habeas application under these circumstances (compare *Piper* v. *United States*, 306 F.Supp. 1259 (D.Conn. 1969), with *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971)). This rule seeks to make clear that they do have such jurisdiction.

Subdivision (c) provides that unless a district court requires otherwise by local rule, the petition must be in the form annexed to these rules. Having a standard prescribed form has several advantages. In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. Since it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient. In addition, lengthy and often illegible petitions, arranged in no logical order, were submitted to judges who have had to spend hours deciphering them. For example, in *Passic* v. *Michigan*, 98 F.Supp. 1015, 1016 (E.D.Mich. 1951), the court dismissed a petition for habeas corpus, describing it as "two thousand pages of irrational, prolix and redundant pleadings * * *."

Administrative convenience, of benefit to both the court and the petitioner, results from the use of a prescribed form. Judge Hubert L. Will briefly described the experience with the use of a standard form in the Northern District of Illinois:

> Our own experience, though somewhat limited, has been quite satisfactory. * * *
>
> In addition, [petitions] almost always contain the necessary basic information * * *. Very rarely do we get the kind of hybrid federal-state habeas corpus petition with civil rights allegations thrown in which were not uncommon in the past. * * * [W]hen a real constitutional issue is raised it is quickly apparent * * *.
>
> 33 F.R.D. 363, 384

Approximately 65 to 70% of all districts have adopted forms or local rules which require answers

to essentially the same questions as contained in the standard form annexed to these rules. All courts using forms have indicated the petitions are time-saving and more legible. The form is particularly helpful in getting information about whether there has been an exhaustion of state remedies or, at least, where that information can be obtained.

The requirement of a standard form benefits the petitioner as well. His assertions are more readily apparent, and a meritorious claim is more likely to be properly raised and supported. The inclusion in the form of the ten most frequently raised grounds in habeas corpus petitions is intended to encourage the applicant to raise all his asserted grounds in one petition. It may better enable him to recognize if an issue he seeks to raise is cognizable under habeas corpus and hopefully inform him of those issues as to which he must first exhaust his state remedies.

Some commentators have suggested that the use of forms is of little help because the questions usually are too general, amounting to little more than a restatement of the statute. They contend the blanks permit a prisoner to fill in the same ambiguous answers he would have offered without the aid of a form. See Comment, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1177–1178 (1970). Certainly, as long as the statute requires factual pleading, the adequacy of a petition will continue to be affected largely by the petitioner's intelligence and the legal advice available to him. On balance, however, the use of forms has contributed enough to warrant mandating their use.

Giving the petitioner a list of often-raised grounds may, it is said, encourage perjury. See Comment, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). Most inmates are aware of, or have access to, some common constitutional grounds for relief. Thus, the risk of perjury is not likely to be substantially increased and the benefit of the list for some inmates seems sufficient to outweigh any slight risk that perjury will increase. There is a penalty for perjury, and this would seem the most appropriate way to try to discourage it.

Legal assistance is increasingly available to inmates either through paraprofessional programs involving law students or special programs staffed by members of the bar. See Jacob and Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 Kan.L.Rev. 493 (1970). In these situations, the prescribed form can be filled out more competently, and it does serve to ensure a degree of uniformity in the manner in which habeas corpus claims are presented.

Subdivision (c) directs the clerk of the district court to make available to applicants upon request, without charge, blank petitions in the prescribed form.

Subdivision (c) also requires that all available grounds for relief be presented in the petition, including those grounds of which, by the exercise of reasonable diligence, the petitioner should be aware. This is reinforced by rule 9(b), which allows dismissal of a second petition which fails to allege new grounds or, if new grounds are alleged, the judge finds an inexcusable failure to assert the ground in the prior petition.

Both subdivision (c) and the annexed form require a legibly handwritten or typewritten petition. As required by 28 U.S.C. § 2242, the petition must be signed and sworn to by the petitioner (or someone acting in his behalf).

Subdivision (d) provides that a single petition may assert a claim only against the judgment or judgments of a single state court (*i.e.*, a court of the same county or judicial district or circuit). This permits, but does not require, an attack in a single petition on judgments based upon separate indictments or on separate counts even though sentences were imposed on separate days by the same court. A claim against a judgment of a court of a different political subdivision must be raised by means of a separate petition.

Subdivision (e) allows the clerk to return an insufficient petition to the petitioner, and it must be returned if the clerk is so directed by a judge of the court. Any failure to comply with the requirements of rule 2 or 3 is grounds for insufficiency. In situations where there may be arguable noncompliance with another rule, such as rule 9, the judge, not the clerk, must make the decision. If the petition is returned it must be accompanied by a statement of the reason for its return. No petitioner should be left to speculate as to why or in what manner his petition failed to conform to these rules.

Subdivision (e) also provides that the clerk shall retain one copy of the insufficient petition. If the prisoner files another petition, the clerk will be in a better position to determine the sufficiency of the new petition. If the new petition is insufficient, comparison with the prior petition may indicate whether the prisoner has failed to understand the clerk's prior explanation for its insufficiency, so that the clerk can make another, hopefully successful, attempt at transmitting this information to the petitioner. If the petitioner insists that the original petition was in compliance with the rules, a copy of the original petition is available for the consideration of the judge. It is probably better practice to make a photocopy of a petition which can be corrected by the petitioner, thus saving the petitioner the task of completing an additional copy.

1976 AMENDMENT

Subd. (c). Pub.L. 94–426, § 2(1), inserted "substantially" following "The petition shall be in", and struck out requirement that the petition follow the prescribed form.

Subd. (e). Pub.L. 94–426, § 2(2), inserted "substantially" following "district court does not", and struck out provision which permitted the clerk to return a petition for noncompliance without a judge so directing.

1982 AMENDMENT

Note to Subdivision (c). The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2254 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if

executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. *Carter v. Clark*, 616 F.2d 228 (5th Cir. 1980). The § 2254 forms have been revised accordingly.

Rule 3. Filing Petition

(a) Place of filing; copies; filing fee. A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

(b) Filing and service. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

Rule 3 sets out the procedures to be followed by the petitioner and the court in filing the petition. Some of its provisions are currently dealt with by local rule or practice, while others are innovations. Subdivision (a) specifies the petitioner's responsibilities. It requires that the petition, which must be accompanied by two conformed copies thereof, be filed in the office of the clerk of the district court. The petition must be accompanied by the filing fee prescribed by law (presently $5; see 28 U.S.C. § 1914(a)), unless leave to prosecute the petition in forma pauperis is applied for and granted. In the event the petitioner desires to prosecute the petition in forma pauperis, he must file the affidavit required by 28 U.S.C. § 1915, together with a certificate showing the amount of funds in his institutional account.

Requiring that the petition be filed in the office of the clerk of the district court provides an efficient and uniform system of filing habeas corpus petitions.

Subdivision (b) requires the clerk to file the petition. If the filing fee accompanies the petition, it may be filed immediately, and, if not, it is contemplated that prompt attention will be given to the request to proceed in forma pauperis. The court may delegate the issuance of the order to the clerk in those cases in which it is clear from the petition that there is full compliance with the requirements to proceed in forma pauperis.

Requiring the copies of the petition to be filed with the clerk will have an impact not only upon administrative matters, but upon more basic problems as well. In districts with more than one judge, a petitioner under present circumstances may send a petition to more than one judge. If no central filing system exists for each district, two judges may independently take different action on the same petition. Even if the action taken is consistent, there may be needless duplication of effort.

The requirement of an additional two copies of the form of the petition is a current practice in many courts. An efficient filing system requires one copy for use by the court (central file), one for the respondent (under 3(b), the respondent receives a copy of the petition whether an answer is required or not), and one for petitioner's counsel, if appointed. Since rule 2 provides that blank copies of the petition in the prescribed form are to be furnished to the applicant free of charge, there should be no undue burden created by this requirement.

Attached to copies of the petition supplied in accordance with rule 2 is an affidavit form for the use of petitioners desiring to proceed in forma pauperis. The form requires information concerning the petitioner's financial resources.

In forma pauperis cases, the petition must also be accompanied by a certificate indicating the amount of funds in the petitioner's institution account. Usually the certificate will be from the warden. If the petitioner is on probation or parole, the court might want to require a certificate from the supervising officer. Petitions by persons on probation or parole are not numerous enough, however, to justify making special provision for this situation in the text of the rule.

The certificate will verify the amount of funds credited to the petitioner in an institution account. The district court may by local rule require that any amount credited to the petitioner, in excess of a stated maximum, must be used for the payment of the filing fee. Since prosecuting an action in forma pauperis is a privilege (see *Smart* v. *Heinze*, 347 F.2d 114, 116 (9th Cir. 1965)), it is not to be granted when the petitioner has sufficient resources.

Subdivision (b) details the clerk's duties with regard to filing the petition. If the petition does not appear on its face to comply with the requirements of rules 2 and 3, it may be returned in accordance with rule 2(e). If it appears to comply, it must be filed and entered on the docket in the clerk's office. However, under this subdivision the respondent is not required to answer or otherwise move with respect to the petition unless so ordered by the court.

Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner

is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

ADVISORY COMMITTEE NOTE

Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order.

28 U.S.C. § 2243 requires that the writ shall be awarded, or an order to show cause issued, "unless it appears from the application that the applicant or person detained is not entitled thereto." Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See 28 U.S.C. § 753(f) which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). However, under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen* v. *Perini*, 424 F.2d 134, 141 (6th Cir. 1970). In addition, "notice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error." See *Aubut* v. *State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970).

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under § 2243 in determining within what time period an answer must be made. Under § 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the Federal Rules of Civil Procedure, Rule 81(a)(2), for good cause. In view of the widespread state of work overload in prosecutors' offices (see, *e.g.*, *Allen*, 424 F.2d at 141), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 U.S.C. § 2254; or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit.

Rule 4 requires that a copy of the petition and any order be served by certified mail on the respondent and the attorney general of the state involved. See 28 U.S.C. § 2252. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 2243. Although the attorney general is served, he is not required to answer if it is more appropriate for some other agency to do so. Although the rule does not specifically so provide, it is assumed that copies of the court orders to respondent will be mailed to petitioner by the court.

Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

ADVISORY COMMITTEE NOTE

Rule 5 details the contents of the "answer". (This is a change in terminology from "return," which is still used below when referring to prior practice.) The answer plays an obviously important rule in a habeas proceeding:

> The return serves several important functions: it permits the court and the parties to uncover quickly the disputed issues; it may reveal to the petitioner's attorney grounds for release that the petitioner did not know; and it may demonstrate that the petitioner's claim is wholly without merit.
>
> Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1083, 1178 (1970).

The answer must respond to the allegations of the petition. While some districts require this by local rule (see, *e.g.*, E.D.N.C.R. 17(B)), under 28 U.S.C. § 2243 little specificity is demanded. As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions such as motions to dismiss. The requirement of the proposed rule that the "answer shall respond to the allegations of the petition" is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.

The answer must also state whether the petitioner has exhausted his state remedies. This is a prerequisite to eligibility for the writ under 28 U.S.C. § 2254(b) and applies to every ground the petitioner raises. Most form petitions now in use contain questions requiring information relevant to whether the petitioner has exhausted his remedies. However, the exhaustion requirement is often not understood by the unrepresented petitioner. The attorney general has both the legal expertise and access to the record and thus is in a much better position to inform the court on the matter of exhaustion of state remedies. An alleged failure to exhaust state remedies as to any ground in the petition may be raised by a motion by the attorney general, thus avoiding the necessity of a formal answer as to that ground.

The rule requires the answer to indicate what transcripts are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. This will serve to inform the court and petitioner as to what factual allegations can be checked against the actual transcripts. The transcripts include pretrial transcripts relating, for example, to pretrial motions to suppress; transcripts of the trial or guilty plea proceeding; and transcripts of any post-conviction proceedings which may have taken place. The respondent is required to furnish those portions of the transcripts which he believes relevant. The court may order the furnishing of additional portions of the transcripts upon the request of petitioner or upon the court's own motion.

Where transcripts are unavailable, the rule provides that a narrative summary of the evidence may be submitted.

Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances. See advisory committee note to rule 9. Therefore, the old common law assumption of verity of the allegations of a return until impeached, as codified in 28 U.S.C. § 2248, is no longer applicable. The meaning of the section, with its exception to the assumption "to the extent that the judge finds from the evidence that they (the allegations) are not true," has given attorneys and courts a great deal of difficulty. It seems that when the petition and return pose an issue of fact, no traverse is required; *Stewart* v. *Overholser*, 186 F.2d 339 (D.C. Cir. 1950).

> We read § 2248 of the Judicial Code as not requiring a traverse when a factual issue has been clearly framed by the petition and the return or answer. This section provides that the allegations of a return or answer to an order to show cause shall be accepted as true if not traversed, except to the extent the judge finds from the evidence that they are not true. This contemplates that where the petition and return or answer do present an issue of fact material to the legality of detention, evidence is required to resolve that issue despite the absence of a traverse. This reference to evidence assumes a hearing on issues raised by the allegations of the petition and the return or answer to the order to show cause.
>
> 186 F.2d at 342, n. 5

In actual practice, the traverse tends to be a mere pro forma refutation of the return, serving little if any expository function. In the interests of a more streamlined and manageable habeas corpus procedure, it is not required except in those instances where it will serve a truly useful purpose. Also, under rule 11 the court is given the discretion to incorporate Federal Rules of Civil Procedure when appropriate, so civil rule 15(a) may be used to allow the petitioner to amend his petition when the court feels this is called for by the contents of the answer.

Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner (or to his attorney if he has one). The number of copies of the answer required is left to the court's discretion. Although the rule requires only a copy of petitioner's brief on appeal, respondent is free also to file a copy of respondent's brief. In practice, courts have found it helpful to have a copy of respondent's brief.

Rule 6. Discovery

(a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) **Expenses.** If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

ADVISORY COMMITTEE NOTE

This rule prescribes the procedures governing discovery in habeas corpus cases. Subdivision (a) provides that any party may utilize the processes of discovery available under the Federal Rules of Civil Procedure (rules 26–37) if, and to the extent that, the judge allows. It also provides for the appointment of counsel for a petitioner who qualifies for this when counsel is necessary for effective utilization of discovery procedures permitted by the judge.

Subdivision (a) is consistent with *Harris* v. *Nelson*, 394 U.S. 286 (1969). In that case the court noted,

> [I]t is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions * * * of the new [Federal Rules of Civil Procedure].
>
> 394 U.S. at 295

However, citing the lack of methods for securing information in habeas proceedings, the court pointed to an alternative.

> Clearly, in these circumstances * * * the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. * * * Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.
>
> 394 U.S. at 299

The court concluded that the issue of discovery in habeas corpus cases could best be dealt with as part of an effort to provide general rules of practice for habeas corpus cases:

> In fact, it is our view that the rulemaking machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery. The problems presented by these proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, and reliance upon usage and the opaque language of Civil Rule 81(a)(2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and § 2255 proceedings would promise much benefit.
>
> 394 U.S. at 301 n. 7

Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing:

> We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles."

Granting discovery is left to the discretion of the court, discretion to be exercised where there is a showing of good cause why discovery should be allowed. Several commentators have suggested that at least some discovery should be permitted without leave of court. It is argued that the courts will be burdened with weighing the propriety of requests to which the discovered party has no objection. Additionally, the availability of protective orders under Fed.R.Civ.R., Rules 30(b) and 31(d) will provide the necessary safeguards. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1186–87 (1970); Civil Discovery in Habeas Corpus, 67 Colum.L.Rev. 1296, 1310 (1967).

Nonetheless, it is felt the requirement of prior court approval of all discovery is necessary to prevent abuse, so this requirement is specifically mandated in the rule.

While requests for discovery in habeas proceedings normally follow the granting of an evidentiary hearing, there may be instances in which discovery would be appropriate beforehand. Such an approach was advocated in *Wagner* v. *United States*, 418 F.2d 618, 621 (9th Cir. 1969), where the opinion stated the trial court could permit interrogatories, provide for deposing witnesses, "and take such other prehearing steps as may be appropriate." While this was an action under § 2255, the reasoning would apply equally well to petitions by state prisoners. Such pre-hearing discovery may show an evidentiary hearing to be unnecessary, as when there are "no disputed issues of law or fact." 83 Harv.L.Rev. 1038, 1181 (1970). The court in Harris alluded to such a possibility when it said "the court may * * * authorize such proceedings with respect to development, *before or in conjunction with the hearing* of the facts * * *." [emphasis added] 394 U.S. at 300. Such pre-hearing discovery, like all discovery under rule 6, requires leave of court. In addition, the provisions in rule 7 for the use of an expanded record may eliminate much of the need for this type of discovery. While probably not as frequently sought or granted as discovery in conjunction with a hearing, it may nonetheless serve a valuable function.

In order to make pre-hearing discovery meaningful, subdivision (a) provides that the judge should appoint counsel for a petitioner who is without counsel and qualifies for appointment when this is necessary for the proper utilization of discovery procedures. Rule 8 provides for the appointment of counsel at the evidentiary hearing stage (see rule 8(b) and advisory committee note), but this would not assist the petitioner who seeks to utilize discovery to stave off dismissal of his petition (see rule 9 and advisory

committee note) or to demonstrate that an evidentiary hearing is necessary. Thus, if the judge grants a petitioner's request for discovery prior to making a decision as to the necessity for an evidentiary hearing, he should determine whether counsel is necessary for the effective utilization of such discovery and, if so, appoint counsel for the petitioner if the petitioner qualifies for such appointment.

This rule contains very little specificity as to what types and methods of discovery should be made available to the parties in a habeas proceeding, or how, once made available, these discovery procedures should be administered. The purpose of this rule is to get some experience in how discovery would work in actual practice by letting district court judges fashion their own rules in the context of individual cases. When the results of such experience are available it would be desirable to consider whether further, more specific codification should take place.

Subdivision (b) provides for judicial consideration of all matters subject to discovery. A statement of the interrogatories, or requests for admission sought to be answered, and a list of any documents sought to be produced, must accompany a request for discovery. This is to advise the judge of the necessity for discovery and enable him to make certain that the inquiry is relevant and appropriately narrow.

Subdivision (c) refers to the situation where the respondent is granted leave to take the deposition of the petitioner or any other person. In such a case the judge may direct the respondent to pay the expenses and fees of counsel for the petitioner to attend the taking of the deposition, as a condition granting the respondent such leave. While the judge is not required to impose this condition subdivision (c) will give the court the means to do so. Such a provision affords some protection to the indigent petitioner who may be prejudiced by his inability to have counsel, often court-appointed, present at the taking of a deposition. It is recognized that under 18 U.S.C. § 3006A(g), court-appointed counsel in a § 2254 proceeding is entitled to receive up to $250 and reimbursement for expenses reasonably incurred. (Compare Fed.R. Crim.P. 15(c).) Typically, however, this does not adequately reimburse counsel if he must attend the taking of depositions or be involved in other pre-hearing proceedings. Subdivision (c) is intended to provide additional funds, if necessary, to be paid by the state government (respondent) to petitioner's counsel.

Although the rule does not specifically so provide, it is assumed that a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and is granted leave to take a deposition will be allowed witness costs. This will include recording and transcription of the witness's statement. Such costs are payable pursuant to 28 U.S.C. § 1825. See Opinion of Comptroller General, February 28, 1974.

Subdivision (c) specifically recognizes the right of the respondent to take the deposition of the petitioner. Although the petitioner could not be called to testify against his will in a criminal trial, it is felt the nature of the habeas proceeding, along with the safeguards accorded by the Fifth Amendment and the presence of counsel, justify this provision. See 83 Harv.L.Rev. 1038, 1183–84 (1970).

Rule 7. Expansion of Record

(a) Direction for expansion. If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

This rule provides that the judge may direct that the record be expanded. The purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered.

The record may be expanded to include additional material relevant to the merits of the petition. While most petitions are dismissed either summarily or after a response has been made, of those that remain, by far the majority require an evidentiary hearing. In the fiscal year ending June 30, 1970, for example, of 8,423 § 2254 cases terminated, 8,231 required court action. Of these, 7,812 were dismissed before a prehearing conference and 469 merited further court action (*e.g.*, expansion of the record, prehearing conference, or an evidentiary hearing). Of the remaining 469 cases, 403 required an evidentiary hearing, often time-consuming, costly, and, at least occasionally, unnecessary. See Director of the Administrative Office of the United States Courts, Annual Report, 245a–245c (table C4) (1970). In some instances these hearings were necessitated by slight omissions in the state record which might have been cured by the use of an expanded record.

Authorizing expansion of the record will, hopefully, eliminate some unnecessary hearings. The value of this approach was articulated in *Raines* v. *United States*, 423 F.2d 526, 529–530 (4th Cir. 1970):

> Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate,

depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits. *United States* v. *Carlino*, 400 F.2d 56 (2nd Cir. 1968); *Mirra* v. *United States*, 379 F.2d 782 (2nd Cir. 1967); *Accardi* v. *United States*, 379 F.2d 312 (2nd Cir. 1967). When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.

In *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969), the court said:

> At any time in the proceedings * * * *either on [the court's] own motion* or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings * * * *before* or in conjunction with the hearing of the facts * * * [emphasis added]

Subdivision (b) specifies the materials which may be added to the record. These include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath directed to written interrogatories propounded by the judge. Under this subdivision affidavits may be submitted and considered part of the record. Subdivision (b) is consistent with 28 U.S.C. §§ 2246 and 2247 and the decision in *Raines* with regard to types of material that may be considered upon application for a writ of habeas corpus. See *United States* v. *Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), and *Machibroda* v. *United States*, 368 U.S. 487 (1962).

Under subdivision (c) all materials proposed to be included in the record must be submitted to the party against whom they are to be offered.

Under subdivision (d) the judge can require authentication if he believes it desirable to do so.

Rule 8. Evidentiary Hearing

(a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.

(As amended Pub.L. 94-426, § 2(5), Sept. 28, 1976, 90 Stat. 1334; Pub.L. 94-577, § 2(a)(1), (b)(1), Oct. 21, 1976, 90 Stat. 2730, 2731.)

ADVISORY COMMITTEE NOTE

This rule outlines the procedure to be followed by the court immediately prior to and after the determination of whether to hold an evidentiary hearing.

The provisions are applicable if the petition has not been dismissed at a previous stage in the proceeding [including a summary dismissal under rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the answer and petition are considered; or a dismissal after consideration of the pleadings and an expanded record].

If dismissal has not been ordered, the court must determine whether an evidentiary hearing is required. This determination is to be made upon a review of the answer, the transcript and record of state court proceedings, and if there is one, the expanded record. As the United States Supreme Court noted in *Townsend* v. *Sam*, 372 U.S. 293, 319 (1963):

> Ordinarily [the complete state-court] record—including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents—is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings.

Subdivision (a) contemplates that all of these materials, if available, will be taken into account. This is especially important in view of the standard set down in *Townsend* for determining *when* a hearing in the federal habeas proceeding is mandatory.

> The appropriate standard * * * is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.
>
> 372 U.S. at 312

The circumstances under which a federal hearing is mandatory are now specified in 28 U.S.C. § 2254(d). The 1966 amendment clearly places the burden on the

petitioner, when there has already been a state hearing, to show that it was not a fair or adequate hearing for one or more of the specifically enumerated reasons, in order to force a federal evidentiary hearing. Since the function of an evidentiary hearing is to try issues of fact (372 U.S. at 309), such a hearing is unnecessary when only issues of law are raised. See, *e.g.*, *Yeaman* v. *United States*, 326 F.2d 293 (9th Cir. 1963).

In situations in which an evidentiary hearing is not mandatory, the judge may nonetheless decide that an evidentiary hearing is desirable:

> The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge.
>
> 372 U.S. at 318

If the judge decides that an evidentiary hearing is neither required nor desirable, he shall make such a disposition of the petition "as justice shall require." Most habeas petitions are dismissed before the prehearing conference stage (see Director of the Administrative Office of the United States Courts, Annual Report 245a–245c (table C4) (1970)) and of those not dismissed, the majority raise factual issues that necessitate an evidentiary hearing. If no hearing is required, most petitions are dismissed, but in unusual cases the court may grant the relief sought without a hearing. This includes immediate release from custody or nullification of a judgment under which the sentence is to be served in the future.

Subdivision (b) provides that a magistrate, when so empowered by rule of the district court, may recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed, provided he gives the district judge a sufficiently detailed description of the facts so that the judge may decide whether or not to hold an evidentiary hearing. This provision is not inconsistent with the holding in *Wingo* v. *Wedding*, 418 U.S. 461 (1974), that the Federal Magistrates Act did not change the requirement of the habeas corpus statute that federal judges personally conduct habeas evidentiary hearings, and that consequently a local district court rule was invalid insofar as it authorized a magistrate to hold such hearings. 28 U.S.C. § 636(b) provides that a district court may by rule authorize any magistrate to perform certain additional duties, including preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

As noted in *Wingo*, review "by Magistrates of applications for post-trial relief is thus limited to review for the purpose of proposing, not holding, evidentiary hearings."

Utilization of the magistrate as specified in subdivision (b) will aid in the expeditious and fair handling of habeas petitions.

> A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [postconviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications.
>
> S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967)

Under subdivision (c) there are two provisions that differ from the procedure set forth in 28 U.S.C. § 2243. These are the appointment of counsel and standard for determining how soon the hearing will be held.

If an evidentiary hearing is required the judge must appoint counsel for a petitioner who qualified for appointment under the Criminal Justice Act. Currently, the appointment of counsel is not recognized as a right at any stage of a habeas proceeding. See, *e.g.*, *United States ex rel. Marshall* v. *Wilkins*, 338 F.2d 404 (2d Cir. 1964). Some district courts have, however, by local rule, required that counsel must be provided for indigent petitioners in cases requiring a hearing. See, *e.g.*, D.N.M.R. 21(f), E.D. N.Y.R. 26(d). Appointment of counsel at this stage is mandatory under subdivision (c). This requirement will not limit the authority of the court to provide counsel at an earlier stage if it is thought desirable to do so as is done in some courts under current practice. At the evidentiary hearing stage, however, an indigent petitioner's access to counsel should not depend on local practice and, for this reason, the furnishing of counsel is made mandatory.

Counsel can perform a valuable function benefiting both the court and the petitioner. The issues raised can be more clearly identified if both sides have the benefit of trained legal personnel. The presence of counsel at the prehearing conference may help to expedite the evidentiary hearing or make it unnecessary, and counsel will be able to make better use of available prehearing discovery procedures. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 4.4, p. 66 (Approved Draft 1968). At a hearing, the petitioner's claims are more likely to be effectively and properly presented by counsel.

Under 18 U.S.C. § 3006A(g), payment is allowed counsel up to $250, plus reimbursement for expenses reasonably incurred. The standards of indigency under this section are less strict than those regarding eligibility to prosecute a petition in forma pauperis, and thus many who cannot qualify to proceed under 28 U.S.C. § 1915 will be entitled to the benefits of counsel under 18 U.S.C. § 3006A(g). Under rule 6(c), the court may order the respondent to reimburse counsel from state funds for fees and expenses incurred as the result of the utilization of discovery procedures by the respondent.

Subdivision (c) provides that the hearing shall be conducted as promptly as possible, taking into account "the need of counsel for both parties for ade-

quate time for investigation and preparation." This differs from the language of 28 U.S.C. § 2243, which requires that the day for the hearing be set "not more than five days after the return unless for good cause additional time is allowed." This time limit fails to take into account the function that may be served by a prehearing conference and the time required to prepare adequately for an evidentiary hearing. Although "additional time" is often allowed under § 2243, subdivision (c) provides more flexibility to take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare.

While the rule does not make specific provision for a prehearing conference, the omission is not intended to cast doubt upon the value of such a conference:

> The conference may limit the questions to be resolved, identify areas of agreement and dispute, and explore evidentiary problems that may be expected to arise. * * * [S]uch conferences may also disclose that a hearing is unnecessary * * *.
>
> ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 4.6, commentary pp. 74–75. (Approved Draft, 1968.)

See also Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1188 (1970).

The rule does not contain a specific provision on the subpoenaing of witnesses. It is left to local practice to determine the method for doing this. The implementation of 28 U.S.C. § 1825 on the payment of witness fees is dealt with in an opinion of the Comptroller General, February 28, 1974.

1976 AMENDMENT

Subsec. (b). Pub.L. 94–577, § 2(a)(1), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected-to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed.

Subsec. (c). Pub.L. 94–577, § 2(b)(1), substituted "and the hearing shall be conducted" for "and shall conduct the hearing".

Pub.L. 94–426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

Rule 9. Delayed or Successive Petitions

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(As amended Pub.L. 94–426, § 2(7), (8), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims and to file multiple petitions. Subdivision (a) deals with the delayed petition. Subdivision (b) deals with the second or successive petition.

Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition. If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice.

The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the decisions in *Jones* v. *Cunningham*, 371 U.S. 236 (1963), and *Benson* v. *California*, 328 F.2d 159 (9th Cir. 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh. The American Bar Association has recognized the interest of the state in protecting itself against stale claims by limiting the right to raise such claims after completion of service of a sentence imposed pursuant to a challenged judgment. See ABA Standards Relating to Post-Conviction Remedies § 2.4(c), p. 45 (Approved Draft, 1968). Subdivision (a) is not limited to those who have completed their sentence. Its reach is broader, extending to all instances where delay by the petitioner has prejudiced the state, subject to the qualifications and conditions contained in the subdivision.

In *McMann* v. *Richardson*, 397 U.S. 759 (1970), the court made reference to the issue of the stale claim:

> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, *but whether, years later,* defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. [Emphasis added.]

397 U.S. at 773

The court refused to allow this, intimating its dislike of collateral attacks on sentences long since imposed which disrupt the state's interest in finality of convictions which were constitutionally valid when obtained.

Subdivision (a) is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30A C.J.S. Equity § 112, p. 19. Also, the language of the subdivision, "a petition *may* be dismissed" [emphasis added], is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

The use of a flexible rule analogous to laches to bar the assertion of stale claims is suggested in ABA Standards Relating to Post-Conviction Remedies § 2.4, commentary at 48 (Approved Draft, 1968). Additionally, in *Fay* v. *Noia*, 372 U.S. 391 (1963), the Supreme Court noted:

> Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

372 U.S. at 438

Finally, the doctrine of laches has been applied with reference to another postconviction remedy, the writ of coram nobis. See 24 C.J.S. Criminal Law § 1606(25), p. 779.

The standard used for determining if the petitioner shall be barred from asserting his claim is consistent with that used in laches provisions generally. The petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief.

Subdivision (a) establishes the presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. "Presumption" has the meaning given it by Fed.R.Evid. 301. The prisoner has "the burden of going forward with evidence to rebut or meet the presumption" that the state has not been prejudiced by the passage of a substantial period of time. This does not impose too heavy a burden on the petitioner. He usually knows what persons are important to the issue of whether the state has been prejudiced. Rule 6 can be used by the court to allow petitioner liberal discovery to learn whether witnesses have died or whether other circumstances prejudicial to the state have occurred. Even if the petitioner should fail to overcome the presumption of prejudice to the state, he is not automatically barred from asserting his claim. As discussed previously, he may proceed if he neither knew nor, by the exercise of reasonable diligence, could have known of the grounds for relief.

The presumption of prejudice does not come into play if the time lag is not more than five years.

The time limitation should have a positive effect in encouraging petitioners who have knowledge of it to assert all their claims as soon after conviction as possible. The implementation of this rule can be substantially furthered by the development of greater legal resources for prisoners. See ABA Standards Relating to Post-Conviction Remedies § 3.1, pp. 49–50 (Approved Draft, 1968).

Subdivision (a) does not constitute an abridgement or modification of a substantive right under 28 U.S.C. § 2072. There are safeguards for the hardship case. The rule provides a flexible standard for determining when a petition will be barred.

Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.

In *Sanders* v. *United States*, 373 U.S. 1 (1963), the court, in dealing with the problem of successive applications, stated:

> Controlling weight *may* be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]

373 U.S. at 15

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since *Sanders*. See *Gains* v. *Allgood*, 391 F.2d 692 (5th Cir. 1968); *Hutchinson* v. *Craven*, 415 F.2d 278 (9th Cir. 1969); *Brown* v. *Peyton*, 435 F.2d 1352 (4th Cir. 1970).

With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:

> In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.
>
> 373 U.S. at 17–18

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

Sanders, 18 U.S.C. § 2244, and subdivision (b) make it clear that the court has discretion to entertain a successive application.

The burden is on the government to plead abuse of the writ. See *Sanders* v. *United States*, 373 U.S. 1, 10 (1963); *Dixon* v. *Jacobs*, 427 F.2d 589, 596 (D.C. Cir. 1970); cf. *Johnson* v. *Copinger*, 420 F.2d 395 (4th Cir. 1969). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. In *Price* v. *Johnston*, 334 U.S. 266, 292 (1948), the court said:

> [I]f the Government chooses * * * to claim that the prisoner has abused the writ of *habeas corpus*, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ.

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> 373 U.S. at 18

There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples. In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. *Sanders*, 373 U.S. at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost. There are instances in which a petitioner will have three or four petitions pending at the same time in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. This subdivision is aimed at screening out the abusive petitions from this large volume, so that the more meritorious petitions can get quicker and fuller consideration.

The form petition, supplied in accordance with rule 2(c), encourages the petitioner to raise all of his available grounds in one petition. It sets out the most common grounds asserted so that these may be brought to his attention.

Some commentators contend that the problem of abuse of the writ of habeas corpus is greatly overstated:

> Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners * * *.
>
> 83 Harv.L.Rev. at 1153–1154

See also ABA Standards Relating to Post-Conviction Remedies § 6.2, commentary at 92 (Approved Draft, 1968), which states: "The occasional, highly litigious prisoner stands out as the rarest exception." While no recent systematic study of repetitious applications exists, there is no reason to believe that the problem has decreased in significance in relation to the total number of § 2254 petitions filed. That number has increased from 584 in 1949 to 12,088 in 1971. See Director of the Administrative Office of the United States Courts, Annual Report, table 16 (1971). It is appropriate that action be taken by rule to allow the courts to deal with this problem, whatever its specific magnitude. The bar set up by subdivision (b) is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis.

If it appears to the court after examining the petition and answer (where appropriate) that there is a high probability that the petition will be barred under either subdivision of rule 9, the court ought to afford petitioner an opportunity to explain his apparent abuse. One way of doing this is by the use of the form annexed hereto. The use of a form will ensure a full airing of the issue so that the court is in a better position to decide whether the petition should be barred. This conforms with *Johnson* v. *Copinger*, 420 F.2d 395 (4th Cir. 1969), where the court stated:

[T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the requirement that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness.

420 F.2d at 399

Use of the recommended form will contribute to an orderly handling of habeas petitions and will contribute to the ability of the court to distinguish the excusable from the inexcusable delay or failure to assert a ground for relief in a prior petition.

1976 AMENDMENT

Subsec. (a). Pub.L. 94–426, § 2(7), struck out provision which established a rebuttable presumption of prejudice to the state if the petition was filed more than five years after conviction and started the running of the five year period, where a petition challenged the validity of an action after conviction, from the time of the order of such action.

Subsec. (b). Pub.L. 94–426, § 2(8), substituted "constituted an abuse of the writ" for "is not excusable".

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.

(As amended Pub.L. 94–426, § 2(11), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTE

Under this rule the duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a magistrate if and to the extent he is empowered to do so by a rule of the district court. However, when such duties involve the making of an order under rule 4 disposing of the petition, that order must be made by the court. The magistrate in such instances must submit to the court his report as to the facts and his recommendation with respect to the order.

The Federal Magistrates Act allows magistrates, when empowered by local rule, to perform certain functions in proceedings for post-trial relief. See 28 U.S.C. § 636(b)(3). The performance of such functions, when authorized, is intended to "afford some degree of relief to district judges and their law clerks, who are presently burdened with burgeoning numbers of habeas corpus petitions and applications under 28 U.S.C. § 2255." Committee on the Judiciary, The Federal Magistrates Act, S.Rep. No. 371, 90th Cong., 1st sess., 26 (1967).

Under 28 U.S.C. § 636(b), any district court, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate * * may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.

The proposed rule recognizes the limitations imposed by 28 U.S.C. § 636(b) upon the powers of magistrates to act in federal postconviction proceedings. These limitations are: (1) that the magistrate may act only pursuant to a rule passed by the majority of the judges in the district court in which the magistrate serves, and (2) that the duties performed by the magistrate pursuant to such rule be consistent with the Constitution and laws of the United States.

It has been suggested that magistrates be empowered by law to hold hearings and make final decisions in habeas proceedings. See Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Iowa L.Rev. 1147, 1158 (1969). However, the Federal Magistrates Act does not authorize such use of magistrates. *Wingo* v. *Wedding*, 418 U.S. 461 (1974). See advisory committee note to rule 8. While the use of magistrates can help alleviate the strain imposed on the district courts by the large number of unmeritorious habeas petitions, neither 28 U.S.C. § 636(b) nor this rule contemplate the abdication by the court of its decision-making responsibility. See also Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1188 (1970).

Where a full-time magistrate is not available, the duties contemplated by this rule may be assigned to a part-time magistrate.

1976 AMENDMENT

Pub.L. 94–426 inserted, "and to the extent the district court has established standards and criteria for the performance of such duties" following "rule of the district court".

1979 AMENDMENT

This amendment conforms the rule to subsequently enacted legislation clarifying and further defining the duties which may be assigned to a magistrate, 18 U.S.C. § 636, as amended in 1976 by Pub.L. 94–577. To the extent that rule 10 is more restrictive than § 636, the limitations are of no effect, for the statute expressly governs "[n]otwithstanding any provision of law to the contrary."

The reference to particular rules is stricken, as under § 636(b)(1)(A) a judge may designate a magistrate to perform duties under other rules as well (e. g., order that further transcripts be furnished under rule 5; appoint counsel under rule 8). The reference to "established standards and criteria" is stricken, as § 636(4) requires each district court to "establish rules pursuant to which the magistrates shall discharge their duties." The exception with respect to a rule 4 order dismissing a petition is stricken, as that limitation appears in § 636(b)(1)(B) and is thereby applicable to certain other actions under these rules as well (e. g., determination of a need for an eviden-

tiary hearing under rule 8; dismissal of a delayed or successive petition under rule 9).

Rule 11. Federal Rules of Civil Procedure; Extent of Applicability

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

ADVISORY COMMITTEE NOTE

Habeas corpus proceedings are characterized as civil in nature. See *e.g.*, *Fisher* v. *Baker*, 203 U.S. 174, 181 (1906). However, under Fed.R.Civ.P. 81(a)(2), the applicability of the civil rules to habeas corpus actions has been limited, although the various courts which have considered this problem have had difficulty in setting out the boundaries of this limitation. See *Harris* v. *Nelson*, 394 U.S. 286 (1969) at 289, footnote 1. Rule 11 is intended to conform with the Supreme Court's approach in the *Harris* case. There the court was dealing with the petitioner's contention that Civil Rule 33 granting the right to discovery via written interrogatories is wholly applicable to habeas corpus proceedings. The court held:

> We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as law and justice require" 28 U.S.C. § 2243.

394 U.S. at 290

The court then went on to consider the contention that the "conformity" provision of Rule 81(a)(2) should be rigidly applied so that the civil rules would be applicable only to the extent that habeas corpus practice had conformed to the practice in civil actions at the time of the adoption of the Federal Rules of Civil Procedure on September 16, 1938. The court said:

> Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of Rule 81(a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.

394 U.S. at 294

The court then reiterated its commitment to judicial discretion in formulating rules and procedures for habeas corpus proceedings by stating:

> [T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.

Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

394 U.S. at 299

Rule 6 of these proposed rules deals specifically with the issue of discovery in habeas actions in a manner consistent with *Harris*. Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice.

Rule 11 permits application of the civil rules only when it would be appropriate to do so. Illustrative of an inappropriate application is that rejected by the Supreme Court in *Pitchess* v. *Davis*, 95 S.Ct. 1748 (1975), holding that Fed.R.Civ.P. 60(b) should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. § 2254.

APPENDIX OF FORMS

MODEL FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name _____
Prison number _____
Place of confinement _____
United States District Court _____ District of _____
Case No. _____
(To be supplied by Clerk of U.S. District Court)
_____, PETITIONER
(Full name)
v.
_____, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)
and
THE ATTORNEY GENERAL OF THE STATE OF _____,
ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he

should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Instructions—Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court whose address is

_____

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack _____
_____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____
_____
_____
_____
5. What was your plea? (Check one)
(a) Not guilty ☐
(b) Guilty ☐
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
_____
_____
_____
6. Kind of trial: (Check one)
(a) Jury ☐
(b) Judge only ☐
7. Did you testify at the trial?
Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
Yes ☐ No ☐
9. If you did appeal, answer the following:
(a) Name of court _____
(b) Result _____
(c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
(a)(1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
_____
_____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result _____
(6) Date of result _____
(b) As to any second petition, application or motion give the same information:
(1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
_____
_____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐
(5) Result _____
(6) Date of result _____
(c) As to any third petition, application or motion, give the same information:
(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____

(date)

_____

Signature of Petitioner

IN FORMA PAUPERIS DECLARATION

_____

[Insert appropriate court]

_____

(Petitioner)

v.

_____

(Respondent(s))

DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐

a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer if "no," state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ☐ No ☐

b. Rent payments, interest or dividends? Yes ☐ No ☐

c. Pensions, annuities or life insurance payments? Yes ☐ No ☐

d. Gifts or inheritances? Yes ☐ No ☐

e. Any other sources? Yes ☐ No ☐

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account?

Yes ☐ No ☐ (Include any funds in prison accounts.)

If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ☐ No ☐

If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

_____

_____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.

(date)

_____

Signature of Petitioner

Certificate

I hereby certify that the petitioner herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institution:

_____

_____

_____

_____

_____

AUTHORIZED OFFICER OF INSTITUTION

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

MODEL FORM FOR USE IN 28 U.S.C. § 2254 CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court,

_____ District of _____

Case No. _____

_____, PETITIONER

v.

_____, RESPONDENT

and

_____, ADDITIONAL RESPONDENT

Petitioner's Response as to Why His Petition Should Not Be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive petitions

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9( ) for the following reason(s):

_____

_____

_____

_____

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is

_____

_____

(V) This response must be legibly handwritten or typewritten, and signed by the petitioner, under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5 below, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered?
   Yes ☐ No ☐
2. If you checked "yes," above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present.

   _____
3. Describe the nature of the assistance, including the names of those who rendered it to you.

   _____

   _____

   _____

   _____
4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This

should be done by relying upon FACTS, not your opinions or conclusions.

_____
_____
_____
_____
_____

5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

_____
_____
_____
_____
_____
_____
_____
_____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.

(date)

_____

Signature of Petitioner

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE

Effective February 1, 1977

As amended to January 1, 1985

Rule
1. Scope of Rules.
2. Motion.
3. Filing Motion.
4. Preliminary Consideration by Judge.
5. Answer; Contents.
6. Discovery.
7. Expansion of Record.
8. Evidentiary Hearing.
9. Delayed or Successive Motions.
10. Powers of Magistrates.
11. Time for Appeal.
12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability.

APPENDIX OF FORMS

Model Form for Motions under 28 U.S.C. § 2255.

Model Form for Use in 28 U.S.C. § 2255 Cases Involving a Rule 9 Issue.

ORDERS OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE

ORDER OF APRIL 26, 1976

1. That the rules and forms governing proceedings in the United States District Courts under Section 2254 and Section 2255 of Title 28, United States Code, as approved by the Judicial Conference of the United States be, and they hereby are, prescribed pursuant to Section 2072 of Title 28, United States Code and Sections 3771 and 3772 of Title 18, United States Code.

2. That the aforementioned rules and forms shall take effect August 1, 1976, and shall be applicable to all proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding would not be feasible or would work injustice.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned rules and forms governing Section 2254 and Section 2255 proceedings to the Congress in accordance with the provisions of Section 2072 of Title 28 and Sections 3771 and 3772 of Title 18, United States Code.

CONGRESSIONAL ACTION ON PROPOSED RULES AND FORMS GOVERNING PROCEEDING UNDER 28 U.S.C. §§ 2254 and 2255

Pub.L. 94-349, § 2, July 8, 1976, 90 Stat. 822, provided: "That, notwithstanding the provisions of section 2072 of title 28 of the United States Code, the rules and forms governing section 2254 cases in the United States district courts and the rules and forms governing section 2255 proceedings in the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until thirty days after the adjournment sine die of the 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier."

Pub.L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

ORDER OF APRIL 30, 1979

1. That Rule 10 of the Rules Governing Proceedings in the United States District Courts on application under Section 2254 of Title 28, United States Code, be, and hereby is, amended to read as follows:

Rule 10. Powers of magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.

2. That Rules 10 and 11 of the Rules Governing Proceedings in the United States District Courts on a motion under Section 2255 of Title 28, United States Code, be, and they hereby are, amended to read as follows:

[See text of Rules 10 and 11 below]

ORDER OF APRIL 28, 1982

1. That the rules and forms governing proceedings in the United States district courts under Section 2254 and Section 2255 of Title 28, United States Code, be, and they hereby are, amended by including therein an amendment to Rule 2(c) of the rules for Section 2254 cases, an amendment to Rule 2(b) of the rules for Section 2255 proceedings, and amendments to the model forms for use in applications under Section 2254 and motions under Section 2255, as hereinafter set forth:

[See amendments made thereby under: Rule 2 and Forms for Motions and Rule 9 Issue Motions, Post; and Rule 2 and Forms for Habeas Corpus Applications and Rule 9 Issues of Rules Governing 28 U.S.C. § 2254 Cases, set out following Rule 22 of Federal Rules of Appellate Procedure, Post.]

2. That the aforementioned amendments shall take effect August 1, 1982, and shall be applicable to all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned amendments to the Congress in accordance with Section 2072 of Title 28 and Sections 3771 and 3772 of Title 18, United States Code.

Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

ADVISORY COMMITTEE NOTE

The basic scope of this postconviction remedy is prescribed by 28 U.S.C. § 2255. Under these rules the person seeking relief from federal custody files a motion to vacate, set aside, or correct sentence, rather than a petition for habeas corpus. This is consistent with the terminology used in section 2255 and indicates the difference between this remedy and federal habeas for a state prisoner. Also, habeas corpus is available to the person in federal custody if his "remedy by motion is inadequate or ineffective to test the legality of his detention."

Whereas sections 2241–2254 (dealing with federal habeas corpus for those in state custody) speak of the district court judge "issuing the writ" as the operative remedy, section 2255 provides that, if the judge finds the movant's assertions to be meritorious, he "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." This is possible because a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action, as appears from the legislative history of section 2 of S. 20, 80th Congress, the provisions of which were incorporated by the same Congress in title 28 U.S.C. as § 2255. In reporting S. 20 favorably the Senate Judiciary Committee said (Sen.Rep. 1526, 80th Cong. 2d Sess., p. 2):

The two main advantages of such motion remedy over the present habeas corpus are as follows:

First, habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner is sentenced (*Ex parte Tom Tong*, 108 U.S. 556, 559 (1883)). It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right—such as lack of counsel—has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial. Even under the broad power in the statute "to dispose of the party as law and justice require" (28 U.S.C.A., sec. 461), the court or judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding (see *Medley*, petitioner, 134 U.S. 160, 174 (1890)). For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to "discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

The fact that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action has significance at several points in these rules. See, *e. g.*, advisory committee note to rule 3 (re no filing fee), advisory committee note to rule 4 (re availability of files, etc., relating to the judgment), advisory committee note to rule 6 (re availability of discovery under criminal procedure rules), advisory committee note to rule 11 (re no extension of time for appeal), and advisory committee note to rule 12 (re applicability of federal criminal rules). However, the fact that Congress has characterized the motion as a further step in the criminal proceedings does *not* mean that proceedings upon such a motion are of necessity governed by the legal principles which are applicable at a criminal trial regarding such matters as counsel, presence, confrontation, self-incrimination, and burden of proof.

The challenge of decisions such as the revocation of probation or parole are not appropriately dealt with under 28 U.S.C. § 2255, which is a continuation of the original criminal action. Other remedies, such as habeas corpus, are available in such situations.

Although rule 1 indicates that these rules apply to a motion for a determination that the judgment was

imposed "in violation of the . . . laws of the United States," the language of 28 U.S.C. § 2255, it is not the intent of these rules to define or limit what is encompassed within that phrase. *See Davis* v. *United States*, 417 U.S. 333 (1974), holding that it is not true "that every asserted error of law can be raised on a § 2255 motion," and that the appropriate inquiry is "whether the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice, 'and whether [i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'"

For a discussion of the "custody" requirement and the intended limited scope of this remedy, see advisory committee note to § 2254 rule 1.

Rule 2. Motion

(a) Nature of application for relief. If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) Form of motion. The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

(c) Motion to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

(d) Return of insufficient motion. If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

(As amended Pub.L. 94-426, § 2(3), (4), Sept. 28, 1976, 90 Stat. 1334; Apr. 28, 1982, eff. Aug. 1, 1982.)

ADVISORY COMMITTEE NOTE

Under these rules the application for relief is in the form of a motion rather than a petition (see rule 1 and advisory committee note). Therefore, there is no requirement that the movant name a respondent. This is consistent with 28 U.S.C. § 2255. The United States Attorney for the district in which the judgment under attack was entered is the proper party to oppose the motion since the federal government is the movant's adversary of record.

If the movant is attacking a federal judgment which will subject him to future custody, he must be in present custody (see rule 1 and advisory committee note) as the result of a state or federal governmental action. He need not alter the nature of the motion by trying to include the government officer who presently has official custody of him as a psuedo-respondent, or third-party plaintiff, or other fabrication. The court hearing his motion attacking the future custody can exercise jurisdiction over those having him in present custody without the use of artificial pleading devices.

There is presently a split among the courts as to whether a person currently in state custody may use a § 2255 motion to obtain relief from a federal judgment under which he will be subjected to custody in the future. Negative, see *Newton* v. *United States*, 329 F.Supp. 90 (S.D.Tex.1971); affirmative, see *Desmond* v. *The United States Board of Parole*, 397 F.2d 386 (1st Cir. 1968), *cert. denied*, 393 U.S. 919 (1968); and *Paolino* v. *United States*, 314 F.Supp. 875 (C.D.Cal.1970). It is intended that these rules settle the matter in favor of the prisoner's being able to file a § 2255 motion for relief under those circumstances. The proper district in which to file such a motion is the one in which is situated the court which rendered the sentence under attack.

Under rule 35, Federal Rules of Criminal Procedure, the court may correct an illegal sentence or a sentence imposed in an illegal manner, or may reduce the sentence. This remedy should be used, rather than a motion under these § 2255 rules, whenever applicable, but there is some overlap between the two proceedings which has caused the courts difficulty.

The movant should not be barred from an appropriate remedy because he has misstyled his motion. See *United States* v. *Morgan*, 346 U.S. 502, 505 (1954). The court should construe it as whichever one is proper under the circumstances and decide it on its merits. For a § 2255 motion construed as a rule 35 motion, see *Heflin* v. *United States*, 358 U.S. 415 (1959); and *United States* v. *Coke*, 404 F.2d 836 (2d Cir. 1968). For writ of error coram nobis treated as a rule 35 motion, see *Hawkins* v. *United States*, 324 F.Supp. 223 (E.D.Texas, Tyler Division 1971). For a rule 35 motion treated as a § 2255 motion, see *Moss* v. *United States*, 263 F.2d 615 (5th Cir. 1959); *Jones* v. *United States*, 400 F.2d 892 (8th Cir. 1968), cert. denied 394 U.S. 991 (1969); and *United States* v. *Brown*, 413 F.2d 878 (9th Cir. 1969), cert. denied 397 U.S. 947 (1970).

One area of difference between § 2255 and rule 35 motions is that for the latter there is no requirement that the movant be "in custody." *Heflin* v. *United States*, 358 U.S. 415, 418, 422 (1959); *Duggins* v. *United States*, 240 F.2d 479, 483 (6th Cir. 1957). Compare with rule 1 and advisory committee note for § 2255 motions. The importance of this distinction has decreased since *Peyton* v. *Rowe*, 391 U.S. 54 (1968), but it might still make a difference in particular situations.

A rule 35 motion is used to attack the sentence imposed not the basis for the sentence. The court in *Gilinsky v. United States*, 335 F.2d 914, 916 (9th Cir. 1964), stated, "a Rule 35 motion presupposes a valid conviction. * * * [C]ollateral attack on errors allegedly committed at trial is not permissible under Rule 35." By illustration the court noted at page 917: "a Rule 35 proceeding contemplates the correction of a sentence of a court having jurisdiction. * * [J]urisdictional defects * * * involve a collateral attack, they must ordinarily be presented under 28 U.S.C. § 2255." In *United States* v. *Semet*, 295 F.Supp. 1084 (E.D.Okla.1968), the prisoner moved under rule 35 and § 2255 to invalidate the sentence he was serving on the grounds of his failure to understand the charge to which he pleaded guilty. The court said:

> As regards Defendant's Motion under Rule 35, said Motion must be denied as it presupposes a valid conviction of the offense with which he was charged and may be used only to attack the sentence. It may not be used to examine errors occurring prior to the imposition of sentence.

295 F.Supp. at 1085

See also: *Moss* v. *United States*, 263 F.2d at 616; *Duggins* v. *United States*, 240 F.2d at 484; *Migdal* v. *United States*, 298 F.2d 513, 514 (9th Cir. 1961); *Jones* v. *United States*, 400 F.2d at 894; *United States* v. *Coke*, 404 F.2d at 847; and *United States* v. *Brown*, 413 F.2d at 879.

A major difficulty in deciding whether rule 35 or § 2255 is the proper remedy is the uncertainty as to what is meant by an "illegal sentence." The Supreme Court dealt with this issue in *Hill* v. *United States*, 368 U.S. 424 (1962). The prisoner brought a § 2255 motion to vacate sentence on the ground that he had not been given a Fed.R.Crim.P. 32(a) opportunity to make a statement in his own behalf at the time of sentencing. The majority held this was not an error subject to collateral attack under § 2255. The five-member majority considered the motion as one brought pursuant to rule 35, but denied relief, stating:

> [T]he narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.

368 U.S. at 430

The four dissenters felt the majority definition of "illegal" was too narrow.

> [Rule 35] provides for the correction of an "illegal sentence" without regard to the reasons why that sentence is illegal and contains not a single word to support the Court's conclusion that only a sentence illegal by reason of the punishment it imposes is "illegal" within the meaning of the Rule I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out constitutes an additional violation of law or not—would be recognized as an "illegal sentence" under any normal reading of the English language.

368 U.S. at 431–432

The 1966 amendment of rule 35 added language permitting correction of a sentence imposed in an "illegal manner." However, there is a 120-day time limit on a motion to do this, and the added language does not clarify the intent of the rule or its relation to § 2255.

The courts have been flexible in considering motions under circumstances in which relief might appear to be precluded by *Hill* v. *United States*. In *Peterson* v. *United States*, 432 F.2d 545 (8th Cir. 1970), the court was confronted with a motion for reduction of sentence by a prisoner claiming to have received a harsher sentence than his codefendants because he stood trial rather than plead guilty. He alleged that this violated his constitutional right to a jury trial. The court ruled that, even though it was past the 120-day time period for a motion to reduce sentence, the claim was still cognizable under rule 35 as a motion to correct an illegal sentence.

The courts have made even greater use of § 2255 in these types of situations. In *United States* v. *Lewis*, 392 F.2d 440 (4th Cir. 1968), the prisoner moved under § 2255 and rule 35 for relief from a sentence he claimed was the result of the judge's misunderstanding of the relevant sentencing law. The court held that he could not get relief under rule 35 because it was past the 120 days for correction of a sentence imposed in an illegal manner and under *Hill* v. *United States* it was not an illegal sentence. However, § 2255 was applicable because of its "otherwise subject to collateral attack" language. The flaw was not a mere trial error relating to the finding of guilt, but a rare and unusual error which amounted to "exceptional circumstances" embraced in § 2255's words "collateral attack." See 368 U.S. at 444 for discussion of other cases allowing use of § 2255 to attack the sentence itself in similar circumstances, especially where the judge has sentenced out of a misapprehension of the law.

In *United States* v. *McCarthy*, 433 F.2d 591, 592 (1st Cir. 1970), the court allowed a prisoner who was past the time limit for a proper rule 35 motion to use § 2255 to attack the sentence which he received upon a plea of guilty on the ground that it was induced by an unfulfilled promise of the prosecutor to recommend leniency. The court specifically noted that under § 2255 this was a proper collateral attack on the sentence and there was no need to attack the conviction as well.

The court in *United States* v. *Malcolm*, 432 F.2d 809, 814, 818 (2d Cir. 1970), allowed a prisoner to challenge his sentence under § 2255 without attacking the conviction. It held rule 35 inapplicable because the sentence was not illegal on its face, but the manner in which the sentence was imposed raised a

question of the denial of due process in the sentencing itself which was cognizable under § 2255.

The flexible approach taken by the courts in the above cases seems to be the reasonable way to handle these situations in which rule 35 and § 2255 appear to overlap. For a further discussion of this problem, see C. Wright, Federal Practice and Procedure: Criminal §§ 581–587 (1969, Supp.1975).

See the advisory committee note to rule 2 of the § 2254 rules for further discussion of the purposes and intent of rule 2 of these § 2255 rules.

1982 AMENDMENT

Note to Subdivision (b). The amendment takes into account 28 U.S.C. § 1746, enacted after adoption of the § 2255 rules. Section 1746 provides that in lieu of an affidavit an unsworn statement may be given under penalty of perjury in substantially the following form if executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." The statute is "intended to encompass prisoner litigation," and the statutory alternative is especially appropriate in such cases because a notary might not be readily available. *Carter v. Clark*, 616 F.2d 228 (5th Cir.1980). The § 2255 forms have been revised accordingly.

Rule 3. Filing Motion

(a) Place of filing; copies. A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

(b) Filing and service. Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

There is no filing fee required of a movant under these rules. This is a change from the practice of charging $15 and is done to recognize specifically the nature of a § 2255 motion as being a continuation of the criminal case whose judgment is under attack.

The long-standing practice of requiring a $15 filing fee has followed from 28 U.S.C. § 1914(a) whereby "parties instituting any civil action * * * pay a filing fee of $15, except that on an application for a writ of habeas corpus the filing fee shall be $5." This has been held to apply to a proceeding under § 2255 despite the rationale that such a proceeding is a motion and thus a continuation of the criminal action. (See note to rule 1.)

A motion under Section 2255 is a civil action and the clerk has no choice but to charge a $15.00 filing fee unless by leave of court it is filed in forma pauperis. *MeCune* v. *United States*, 406 F.2d 417, 419 (6th Cir. 1969).

Although the motion has been considered to be a new civil action in the nature of habeas corpus for filing purposes, the reduced fee for habeas has been held not applicable. The Tenth Circuit considered the specific issue in *Martin* v. *United States*, 273 F.2d 775 (10th Cir. 1960), cert. denied, 365 U.S. 853 (1961), holding that the reduced fee was exclusive to habeas petitions.

Counsel for Martin insists that, if a docket fee must be paid, the amount is $5 rather than $15 and bases his contention on the exception contained in 28 U.S.C. § 1914 that in habeas corpus the fee is $5. This reads into § 1914 language which is not there. While an application under § 2255 may afford the same relief as that previously obtainable by habeas corpus, it is not a petition for a writ of habeas corpus. A change in § 1914 must come from Congress.

273 F.2d at 778

Although for most situations § 2255 is intended to provide to the federal prisoner a remedy equivalent to habeas corpus as used by state prisoners, there is a major distinction between the two. Calling a § 2255 request for relief a motion rather than a petition militates toward charging no new filing fee, not an increased one. In the absence of convincing evidence to the contrary, there is no reason to suppose that Congress did not mean what it said in making a § 2255 action a motion. Therefore, as in other motions filed in a criminal action, there is no requirement of a filing fee. It is appropriate that the present situation of docketing a § 2255 motion as a new action and charging a $15 filing fee be remedied by the rule when the whole question of § 2255 motions is thoroughly thought through and organized.

Even though there is no need to have a forma pauperis affidavit to proceed with the action since there is no requirement of a fee for filing the motion the affidavit remains attached to the form to be supplied potential movants. Most such movants are indigent, and this is a convenient way of getting this into the official record so that the judge may appoint counsel, order the government to pay witness fees, allow docketing of an appeal, and grant any other rights to which an indigent is entitled in the course of a § 2255 motion, when appropriate to the particular situation, without the need for an indigency petition and adjudication at such later point in the proceeding. This should result in a streamlining of the process to allow quicker disposition of these motions.

For further discussion of this rule, see the advisory committee note to rule 3 of the § 2254 rules.

Rule 4. Preliminary Consideration by Judge

(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the

judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

ADVISORY COMMITTEE NOTE

Rule 4 outlines the procedure for assigning the motion to a specific judge of the district court and the options available to the judge and the government after the motion is properly filed.

The long-standing majority practice in assigning motions made pursuant to § 2255 has been for the trial judge to determine the merits of the motion. In cases where the § 2255 motion is directed against the sentence, the merits have traditionally been decided by the judge who imposed sentence. The reasoning for this was first noted in *Currell* v. *United States*, 173 F.2d 348–349 (4th Cir. 1949):

> Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred.

This case, and its reasoning, has been almost unanimously endorsed by other courts dealing with the issue.

Commentators have been critical of having the motion decided by the trial judge. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1206–1208 (1970).

> [T]he trial judge may have become so involved with the decision that it will be difficult for him to review it objectively. Nothing in the legislative history suggests that "court" refers to a specific judge, and the procedural advantages of section 2255 are available whether or not the trial judge presides at the hearing.
>
> The theory that Congress intended the trial judge to preside at a section 2255 hearing apparently originated in *Carvell* v. *United States*, 173 F.2d 348 (4th Cir. 1949) (per curiam), where the panel of judges included Chief Judge Parker of the Fourth Circuit, chairman of the Judicial Conference committee which drafted section 2255. But the legislative history does not indicate that Congress wanted the trial judge to preside. Indeed the advantages of section 2255 can all be achieved if the case is heard in the sentencing district, regardless of which judge hears it. According to the Senate committee report the purpose of the bill was to make the proceeding a part of the criminal action so the court could resentence the applicant, or grant him a new trial. (A judge presiding over a habeas corpus action does not have these powers.) In addition, Congress did not want the cases heard in the district of confinement because that tended to concentrate the burden on a few districts, and made it difficult for witnesses and records to be produced.
>
> 83 Harv.L.Rev. at 1207–1208

The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion. See *Halliday* v. *United States*, 380 F.2d 270 (1st Cir. 1967).

There is a procedure by which the movant can have a judge other than the trial judge decide his motion in courts adhering to the majority rule. He can file an affidavit alleging bias in order to disqualify the trial judge. And there are circumstances in which the trial judge will, on his own, disqualify himself. See, *e.g.*, *Webster* v. *United States*, 330 F.Supp. 1080 (1972). However, there has been some questioning of the effectiveness of this procedure. See Developments in the Law—Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1200–1207 (1970).

Subdivision (a) adopts the majority rule and provides that the trial judge, or sentencing judge if different and appropriate for the particular motion, will decide the motion made pursuant to these rules, recognizing that, under some circumstances, he may want to disqualify himself. A movant is not without remedy if he feels this is unfair to him. He can file an affidavit of bias. And there is the right to appellate review if the trial judge refuses to grant his motion. Because the trial judge is thoroughly familiar with the case, there is obvious administrative advantage in giving him the first opportunity to decide whether there are grounds for granting the motion.

Since the motion is part of the criminal action in which was entered the judgment to which it is directed, the files, records, transcripts, and correspondence relating to that judgment are automatically available to the judge in his consideration of the motion. He no longer need order them incorporated for that purpose.

Rule 4 has its basis in § 2255 (rather than 28 U.S.C. § 2243 in the corresponding habeas corpus rule) which does not have a specific time limitation as to when the answer must be made. Also, under § 2255, the United States Attorney for the district is the party served with the notice and a copy of the motion and required to answer (when appropriate). Subdivision (b) continues this practice since there is no respondent involved in the motion (unlike habeas) and the United States Attorney, as prosecutor in the case in question, is the most appropriate one to defend the judgment and oppose the motion.

The judge has discretion to require an answer or other appropriate response from the United States Attorney. See advisory committee note to rule 4 of the § 2254 rules.

Rule 5. Answer; Contents

(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

(b) Supplementing the answer. The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

ADVISORY COMMITTEE NOTE

Unlike the habeas corpus statutes (see 28 U.S.C. §§ 2243, 2248) § 2255 does not specifically call for a return or answer by the United States Attorney or set any time limits as to when one must be submitted. The general practice, however, if the motion is not summarily dismissed, is for the government to file an answer to the motion as well as counter-affidavits, when appropriate. Rule 4 provides for an answer to the motion by the United States Attorney, and rule 5 indicates what its contents should be.

There is no requirement that the movant exhaust his remedies prior to seeking relief under § 2255. However, the courts have held that such a motion is inappropriate if the movant is simultaneously appealing the decision.

> We are of the view that there is no jurisdictional bar to the District Court's entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances.
>
> *Womack* v. *United States*, 395 F.2d 630, 631 (D.C.Cir. 1968)

Also see *Masters* v. *Eide*, 353 F.2d 517 (8th Cir. 1965). The answer may thus cut short consideration of the motion if it discloses the taking of an appeal which was omitted from the form motion filed by the movant.

There is nothing in § 2255 which corresponds to the § 2248 requirement of a traverse to the answer. Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held. *Machibroda* v. *United States*, 368 U.S. 487, 494, 495 (1962); *United States* v. *Salerno*, 290 F.2d 105, 106 (2d Cir. 1961); *Romero* v. *United States*, 327 F.2d 711, 712 (5th Cir. 1964); *Scott* v. *United States*, 349 F.2d 641, 642, 643 (6th Cir. 1965); *Schiebelhut* v. *United States*, 357 F.2d 743, 745 (6th Cir. 1966); and *Del Piano* v. *United States*, 362 F.2d 931, 932, 933 (3d Cir. 1966). None of these cases make any mention of a traverse by the movant to the government's answer. As under rule 5 of the § 2254 rules, there is no intention here that such a traverse be required, except under special circumstances. See advisory committee note to rule 9.

Subdivision (b) provides for the government to supplement its answers with appropriate copies of transcripts or briefs if for some reason the judge does not already have them under his control. This is because the government will in all probability have easier access to such papers than the movant, and it will conserve the court's time to have the government produce them rather than the movant, who would in most instances have to apply in forma pauperis for the government to supply them for him anyway.

For further discussion, see the advisory committee note to rule 5 of the § 2254 rules.

Rule 6. Discovery

(a) Leave of court required. A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).

(b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

ADVISORY COMMITTEE NOTE

This rule differs from the corresponding discovery rule under the § 2254 rules in that it includes the processes of discovery available under the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a § 2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

See the advisory committee note to rule 6 of the § 2254 rules. The discussion there is fully applicable to discovery under these rules for § 2255 motions.

Rule 7. Expansion of Record

(a) Direction for expansion. If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of

additional materials relevant to the determination of the merits of the motion.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

It is less likely that the court will feel the need to expand the record in a § 2255 proceeding than in a habeas corpus proceeding, because the trial (or sentencing) judge is the one hearing the motion (see rule 4) and should already have a complete file on the case in his possession. However, rule 7 provides a convenient method for supplementing his file if the case warrants it.

See the advisory committee note to rule 7 of the § 2254 rules for a full discussion of reasons and procedures for expanding the record.

Rule 8. Evidentiary Hearing

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

(As amended Pub.L. 94–426, § 2(6), Sept. 28, 1976, 90 Stat. 1335; Pub.L. 94–577, § 2(a)(2), (b)(2), Oct. 21, 1976, 90 Stat. 2730, 2731.)

ADVISORY COMMITTEE NOTE

The standards for § 2255 hearings are essentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact-finding proceeding is in issue rather than the state's. Also § 2255 does not set specific time limits for holding the hearing, as does § 2243 for a habeas action. With these minor differences in mind, see the advisory committee note to rule 8 of § 2254 rules, which is applicable to rule 8 of these § 2255 rules.

Rule 9. Delayed or Successive Motions

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(As amended Pub.L. 94–426, § 2(9), (10), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

Unlike the statutory provisions on habeas corpus (28 U.S.C. §§ 2241–2254), § 2255 specifically provides that "a motion for such relief may be made *at any time*." [Emphasis added.] Subdivision (a) provides that delayed motions may be barred from consideration if the government has been prejudiced in its ability to respond to the motion by the delay and the movant's failure to seek relief earlier is not excusable within the terms of the rule. Case law, dealing with this issue, is in conflict.

Some courts have held that the literal language of § 2255 precludes any possible time bar to a motion brought under it. In *Heflin v. United States*, 358 U.S. 415 (1959), the concurring opinion noted:

> The statute [28 U.S.C. § 2255] further provides: "A motion * * * may be made at any time." This * * * simply means that, as in habeas corpus, there is no statute of limitations, no *res judicata*, and that the doctrine of laches is inapplicable.
>
> 358 U.S. at 420

McKinney v. *United States*, 208 F.2d 844 (D.C.Cir. 1953) reversed the district court's dismissal of a § 2255 motion for being too late, the court stating:

> McKinney's present application for relief comes late in the day: he has served some fifteen years in prison. But tardiness is irrelevant where a constitutional issue is raised and where the prisoner is still confined.

208 F.2d at 846, 847

In accord, see: *Juelich* v. *United States*, 300 F.2d 381, 383 (5th Cir. 1962); *Conners* v. *United States*, 431 F.2d 1207, 1208 (9th Cir. 1970); *Sturrup* v. *United States*, 218 F.Supp. 279, 281 (E.D.N.Car. 1963); and *Banks* v. *United States*, 319 F.Supp. 649, 652 (S.D.N.Y.1970).

It has also been held that delay in filing a § 2255 motion does not bar the movant because of lack of reasonable diligence in pressing the claim.

> The statute [28 U.S.C. § 2255], when it states that the motion may be made at any time, excludes the addition of a showing of diligence in delayed filings. A number of courts have considered contentions similar to those made here and have concluded that there are no time limitations. This result excludes the requirement of diligence which is in reality a time limitation.

Haier v. *United States*, 334 F.2d 441, 442 (10th Cir. 1964)

Other courts have recognized that delay may have a negative effect on the movant. In *Raines* v. *United States*, 423 F.2d 526 (4th Cir. 1970), the court stated:

> [B]oth petitioners' silence for extended periods, one for 28 months and the other for nine years, serves to render their allegations less believable. "Although a delay in filing a section 2255 motion is not a controlling element * * * it may merit some consideration * * *."

423 F.2d at 531

In *Aiken* v. *United States*, 191 F.Supp. 43, 50 (M.D.N.Car.1961), aff'd 296 F.2d 604 (4th Cir. 1961), the court said: "While motions under 28 U.S.C. § 2255 may be made at any time, the lapse of time affects the good faith and credibility of the moving party." For similar conclusions, see: *Parker* v. *United States*, 358 F.2d 50, 54 n. 4 (7th Cir. 1965), cert. denied, 386 U.S. 916 (1967); *Le Clair* v. *United States*, 241 F.Supp. 819, 824 (N.D.Ind.1965); *Malone* v. *United States*, 299 F.2d 254, 256 (6th Cir. 1962), cert. denied, 371 U.S. 863 (1962); *Howell* v. *United States*, 442 F.2d 265, 274 (7th Cir. 1971); and *United States* v. *Wiggins*, 184 F.Supp. 673, 676 (D.C.Cir. 1960).

There have been holdings by some courts that a delay in filing a § 2255 motion operates to increase the burden of proof which the movant must meet to obtain relief. The reasons for this, as expressed in *United States v. Bostie*, 206 F.Supp. 855 (D.C.Cir. 1962), are equitable in nature.

> Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. § 2255 is on the moving party. . . . The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. No doubt, at times such a motion is a product of an afterthought. Long delay may raise a question of good faith.

206 F.Supp. at 856–857

See also *United States* v. *Wiggins*, 184 F.Supp. at 676.

A requirement that the movant display reasonable diligence in filing a § 2255 motion has been adopted by some courts dealing with delayed motions. The court in *United States* v. *Moore*, 166 F.2d 102 (7th Cir. 1948), cert. denied, 334 U.S. 849 (1948), did this, again for equitable reasons.

> [W]e agree with the District Court that the petitioner has too long slept upon his rights. * * * [A]pparently there is no limitation of time within which * * * a motion to vacate may be filed, except that an applicant must show reasonable diligence in presenting his claim. * * *
>
> The reasons which support the rule requiring diligence seem obvious. * * * Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time.

166 F.2d at 105

In accord see *Desmond* v. *United States*, 333 F.2d 378, 381 (1st Cir. 1964), on remand, 345 F.2d 225 (1st Cir. 1965).

One of the major arguments advanced by the courts which would penalize a movant who waits an unduly long time before filing a § 2255 motion is that such delay is highly prejudicial to the prosecution. In *Desmond* v. *United States*, writing of a § 2255 motion alleging denial of effective appeal because of deception by movant's own counsel, the court said:

> [A]pplications for relief such as this must be made promptly. It will not do for a prisoner to wait until government witnesses have become unavailable as by death, serious illness or absence from the country, or until the memory of available government witnesses has faded. It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney.

333 F.2d at 381

In a similar vein are *United States* v. *Moore* and *United States* v. *Bostic*, supra, and *United States* v. *Wiggins*, 184 F.Supp. at 676.

Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from

withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial. It includes a reasonable diligence requirement for ascertaining possible grounds for relief. If the delay is found to be excusable, or nonprejudicial to the government, the time bar is inoperative.

Subdivision (b) is consistent with the language of § 2255 and relevant case law.

The annexed form is intended to serve the same purpose as the comparable one included in the § 2254 rules.

For further discussion applicable to this rule, see the advisory committee note to rule 9 of the § 2254 rules.

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. § 636.

(As amended Pub.L. 94-426, § 2(12), Sept. 28, 1976, 90 Stat. 1335; Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTES

See the advisory committee note to rule 10 of the § 2254 rules for a discussion fully applicable here as well.

1979 AMENDMENT

This amendment conforms the rule to 18 U.S.C. § 636. See Advisory Committee Note to rule 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

Rule 11. Time for Appeal

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

ADVISORY COMMITTEE NOTES

Rule 11 is intended to make clear that, although a § 2255 action is a continuation of the criminal case, the bringing of a § 2255 action does not extend the time.

1979 AMENDMENT

Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed.R.App.P. 4(a), that is, 60 days when the government is a party, rather than as provided in appellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., *Rothman* v. *United States*, 508 F.2d 648 (3d Cir. 1975). Because the new section 2255 rules are based upon the premise "that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to rule 1, the question has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to rule 11 in order to make it clear that this is not the case.

Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In *United States* v. *Hayman*, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited *Mercado* v. *United States*, 183 F.2d 486 (1st Cir. 1950), a case rejecting the argument that because § 2255 proceedings are criminal in nature the time for appeal is only 10 days. The *Mercado* court concluded that the situation was governed by that part of 28 U.S.C. § 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in § 2255 cases even though they are criminal in nature.

Rule 12. Federal Rules of Criminal and Civil Procedure: Extent of Applicability

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

References in Text. The Federal Rules of Criminal Procedure, referred to in text, are set out in this pamphlet.

The Federal Rules of Civil Procedure, referred to in text, are classified generally to the Appendix to Title 28, U.S.C.A., Judiciary and Judicial Procedure.

ADVISORY COMMITTEE NOTE

This rule differs from rule 11 of the § 2254 rules in that it includes the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a § 2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

Since § 2255 has been considered analogous to habeas as respects the restrictions in Fed.R.Civ.P. 81(a)(2) (see *Sullivan v. United States*, 198 F.Supp. 624 (S.D.N.Y.1961)), rule 12 is needed. For discussion, see the advisory committee note to rule 11 of the § 2254 rules.

APPENDIX OF FORMS

MODEL FORM FOR MOTIONS UNDER 28 U.S.C. § 2255

Name _____

Prison Number _____

Place of Confinement _____

Forms

United States District Court _____ District of _____ Case No. _____ (to be supplied by Clerk of U.S. District Court)

United States,

v.

_____

(full name of movant)

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Instructions—Read Carefully

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis* in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the *original* and *two copies* must be mailed to the Clerk of the United States District Court whose address is _____

_____

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack _____
2. Date of judgment of conviction _____
3. Length of sentence _____
4. Nature of offense involved (all counts) _____
5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐
9. If you did appeal, answer the following:
   (a) Name of court _____
   (b) Result _____
   (c) Date of result _____
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
    Yes ☐ No ☐
11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court _____
    (2) Nature of proceeding _____
    (3) Grounds raised _____
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☐
    (5) Result _____
    (6) Date of result _____
    (b) As to any second petition, application or motion give the same information:
    (1) Name of court _____
    (2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following list is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds

were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing _____
(b) At arraignment and plea _____
(c) At trial _____
(d) At sentencing _____
(e) On appeal _____
(f) In any post-conviction proceeding _____
(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐
(a) If so, give name and location of court which imposed sentence to be served in the future: _____
(b) And give date and length of sentence to be served in the future: _____
(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Movant

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

_____ DECLARATION IN
United States IN SUPPORT
v. OF REQUEST
_____ _____ TO PROCEED
(Movant) *IN FORMA PAUPERIS*

I, _____, declare that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes ☐ No ☐
a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.
b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources?
a. Business, profession or form of self-employment?
Yes ☐ No ☐
b. Rent payments, interest or dividends?
Yes ☐ No ☐
c. Pensions, annuities or life insurance payments?
Yes ☐ No ☐
d. Gifts or inheritances?
Yes ☐ No ☐
e. Any other sources?
Yes ☐ No ☐
If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own any cash, or do you have money in a checking or savings account?
Yes ☐ No ☐ (Include any funds in prison accounts)
If the answer is "yes," state the total value of the items owned. _____

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
Yes ☐ No ☐
If the answer is "yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.
(date)

_____
Signature of Movant

CERTIFICATE

I hereby certify that the movant herein has the sum of $_____ on account to his credit at the _____ institution where he is confined. I further certify that movant likewise has the following securities to his credit according to the records of said ____ institution: _____

_____
Authorized Officer of Institution

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

MODEL FORM FOR USE IN 28 U.S.C. § 2255 CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court

_____ District of _____

Case No. _____

United States

v.

_____

(Name of Movant)

Movant's Response as to Why His Motion Should Not be Barred Under Rule 9

Explanation and Instructions—Read Carefully

(I) Rule 9. Delayed or successive motions.

(a) Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under rule 9( ) for the following reason(s):

_____

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within _____ days. Failure to do so will result in the automatic dismissal of your motion.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____

_____

(V) This response must be legibly handwritten or typewritten, and signed by the movant, under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 or 5, not to both, unless (II) above indicates that you must answer both sections.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?
Yes ☐ No ☐

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present. _____

3. Describe the nature of the assistance, including the names of those who rendered it to you. _____

4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions. _____

5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions. _____

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on _____.

(date)

_____

Signature of Movant

(As amended Apr. 28, 1982, eff. Aug. 1, 1982.)

RULES OF PROCEDURE

FOR THE

TRIAL OF MISDEMEANORS

BEFORE

UNITED STATES MAGISTRATES

Effective June 1, 1980

TABLE OF RULES

Rule
1. Scope
2. Pretrial Procedures
3. Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment will be Imposed
4. Securing Defendant's Appearance; Payment in Lieu of Appearance
5. Record
6. New Trial

Rule
7. Appeal
8. Local Rules

Amendment of Analysis

Pub.L. 98-473, Title II, §§ 216(b), 235, Oct. 12, 1984, 98 Stat. 2017, 2031, provided that, effective on Nov. 1, 1986, the analysis of rules preceding rule 1 of these rules is amended by adding at the end thereof the following new item:

"9. Definition."

ORDER OF SUPREME COURT

June 1, 1980

ORDER PRESCRIBING RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

Ordered that the following Rules to be known as the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, be and they are hereby prescribed pursuant to § 3402 of Title 18, United States Code. These Rules shall become effective on June 1, 1980, and shall supersede the Rules for the Trial of Minor Offenses before United States Magistrates heretofore promulgated by this Court on January 27, 1971.

Rule 1. Scope

(a) In General. These rules govern the procedure and practice for the conduct of proceedings in misdemeanor cases, including petty offenses, before United States magistrates under 18 U.S.C. § 3401, and for appeals in such cases to judges of the district courts.

(b) Applicability of Federal Rules of Criminal Procedure. Except as specifically provided by these rules, the Federal Rules of Criminal Procedure govern all proceedings except those concerning petty offenses for which no sentence of imprisonment will be imposed. Proceedings concerning petty offenses for which no sentence of imprisonment will be imposed are not governed by the Federal Rules of Criminal Procedure, except as specifically provided therein or by these rules. However, to the extent they are not inconsistent with these rules, a magistrate may follow such provisions of the Federal Rules of Criminal Procedure as he deems appropriate.

(c) Definition. The term "petty offenses for which no sentence of imprisonment will be imposed," as used in these rules, means any petty offenses, regardless of the penalty authorized by law, as to which the magistrate determines that, in the event of conviction, no sentence of imprisonment will actually be imposed in the particular case.

References in Text. The Federal Rules of Criminal Procedure, referred to in subsec. (b), are set out in this pamphlet.

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (a) differs from its predecessor, the first sentence of rule 1 of the 1971 Magistrates Rules, in that it makes these rules applicable to the trial of all misdemeanors before United States magistrates. For the applicable definition of "misdemeanor," see 18 U.S.C. § 1 [section 1 of this title]. It reflects the expansion of criminal trial jurisdiction of such magistrates by that part of the Federal Magistrate Act of 1979 [Pub.L. 96–82, Oct. 10, 1979, § 7(a), (b), 93 Stat. 645, 646] which amended 18 U.S.C. § 3401 [section 3401 of this title].

Subdivision (b) draws a critical distinction between petty offenses for which no sentence of imprisonment will be imposed and other misdemeanors. As to the latter, the Federal Rules of Criminal Procedure [this pamphlet] govern except as to procedures specifically covered by these rules. By contrast, procedures in other cases are not governed by the Federal Rules of Criminal Procedure except as specifically provided therein or in these rules, though it is expressly recognized that a magistrate may follow those provisions of the Federal Rules of Criminal Procedure as he deems appropriate.

Subdivision (b) reflects the policy that misdemeanor cases above the petty offense level or which result in imprisonment should be dealt with in essentially the same way whether or not the defendant has consented to disposition before a magistrate. This is a sound policy, as defendants would be discouraged from giving such consent if many procedural protections were thereby forfeited. To so discourage consent would work against the underlying objectives of the Federal Magistrate Act of 1979 [Pub.L. 96–82, Oct. 10, 1979, 93 Stat. 643].

By stating that the Federal Rules of Criminal Procedure [this pamphlet] do not apply in other cases but that magistrates trying such cases may follow such provisions of those rules as are deemed appropriate, subdivision (b) deals unambiguously with an issue not clearly resolved in the 1971 Magistrates Rules. Though rule 1 of those rules strongly implies that the criminal procedure rules are not applicable to petty offenses, rule 3(c)(1) requires a magistrate to try a petty offense case in the same manner as a district judge. Moreover, rule 11(b) of the 1971 rules declares that the magistrate "may proceed in any lawful manner not inconsistent with these rules or with any applicable statute," which can be read as either requiring the application of the criminal procedure rules to all petty offense procedures or as authorizing selective application of the criminal procedure rules to petty offense cases. Subdivision (b) of the present rule reflects the fact that the full panoply of rights and procedures to be found in the Federal Rules of Criminal Procedure are neither feasible nor essential when magistrates are dealing with very minor offenses. At the same time, subdivision (b) recognizes that the magistrate may properly look selectively to the Federal Rules of Criminal Procedure in such cases.

Because the distinction between petty offenses for which no sentence of imprisonment will be imposed and other misdemeanors is critical here and in following rules, it must be emphasized that the definition of a "petty offense" in 18 U.S.C. § 1(3) [section 1(3) of this title], "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both," will *usually but not inevitably* apply here. The Supreme Court has recognized the historical difference in treatment accorded petty offenses and has excluded them from the requirement that the trial of "crimes" be by jury. District of Columbia v. Clawens, 57 S.Ct. 660, 300 U.S. 617, 81 L.Ed. 843 (1937); Schick v. United States, 24 S.Ct. 826, 195 U.S. 63, 49 L.Ed. 99 (1904). Nevertheless, certain offenses have traditionally been considered "crimes" at common law, and are still such even though the maximum penalty currently prescribed by law is not more than six months imprisonment or a fine of $500. That is, the penalty prescribed is of major relevance in determining whether an offense is petty in the constitutional sense, but is not the sole criterion; the historical antecedents of the offense and the ethical condemnation with which the community views the offense are also important. See Baldwin v. New York, 90 S.Ct. 1886, 399 U.S. 66, 26 L.Ed.2d 437 (1970); Duncan v. Louisiana, 88 S.Ct. 1444, 391 U.S. 145, 194, 20 L.Ed.2d 491, 522 (1968). By such reasoning, a defendant has been held to have a constitutional right to jury trial, without regard to the potential penalties, for such offenses as driving while intoxicated, District of Columbia v. Colts, 51 S.Ct. 52, 282 U.S. 63, 75 L.Ed. 177 (1930), and conspiracy, United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976). See also discussion and cases cited in Brady v. Blair, 427 F.Supp. 5, 9–10 (S.D.Ohio 1976); and Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv.L.Rev. 917 (1926).

But it must be emphasized that the Federal Rules of Criminal Procedure [this pamphlet] do apply to those petty offenses for which it is possible that a penalty of imprisonment will be imposed. Thus, these rules employ the standard adopted by the Supreme Court for determin-

ing when appointment of counsel is constitutionally required. Scott v. Illinois, 99 S.Ct. 1158, 440 U.S. 367, 59 L.Ed.2d 383 (1979). Precisely the reasons given by the Court for concluding that such cases are important and significant enough to require assistance of counsel have led the Advisory Committee to conclude that these cases are deserving of all the procedural protections provided by the Federal Rules of Criminal Procedure. As with Scott, the "imprisonment will be imposed" test in these rules, as defined in subdivision (c), presents the difficulty that the distinction being made refers to an event which has not yet occurred—sentencing. However, in most cases it will be apparent from the nature of the charge or other circumstances, readily ascertainable by inquiry of the U.S. Attorney or law enforcement officer or otherwise, whether imprisonment (if authorized by statute for the offense charged) is a realistic possibility. If it is, the safer course of action is full compliance with the Federal Rules of Criminal Procedure, as only then will it be possible to sentence to imprisonment if it later appears that such a sentence would be appropriate in the particular case.

Rule 2. Pretrial Procedures

(a) Trial Document. The trial of a misdemeanor may proceed on an indictment, information, or complaint or, if it be a petty offense, on a citation or violation notice. The district court, by order or local rule, may make provision for the reference of such cases to a magistrate.

(b) Initial Appearance. At the defendant's initial appearance on a misdemeanor charge, the magistrate shall inform the defendant of the following:

(1) the charge against him, and the maximum possible penalty provided by law;

(2) his right to retain counsel;

(3) unless he is charged with a petty offense for which appointment of counsel is not required, his right to request the assignment of counsel if he is unable to obtain counsel;

(4) that he is not required to make a statement and that any statement made by him may be used against him;

(5) that he has a right to trial, judgment and sentencing before a judge of the district court;

(6) unless the offense charged is a petty offense, that he has a right to trial by jury before either a magistrate or a judge of the district court;

(7) if the prosecution is not on an indictment or information and is for a misdemeanor other than a petty offense, that he has a right to have a preliminary examination unless he consents to be tried before the magistrate; and

(8) if he is in custody, of the general circumstances under which he may secure pretrial release.

(c) Consent and Arraignment. If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the misdemeanor charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, *nolo contendere*. If the defendant pleads not guilty, the magistrate shall either conduct the trial within 30 days upon written consent of the defendant or fix a later time for the trial, giving due regard to the needs of the parties to consult with counsel and prepare for trial.

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (a) deals with those matters covered in rules 2(a) and 3(a) in the 1971 Magistrates Rules. Apart from the broadening of the provision to cover all misdemeanors, only one substantive change has been made. An indictment has been included as a trial document, as on occasion a grand jury will indict a defendant for a petty offense or other misdemeanor. A misdemeanor case above the petty offense level (see note to rule 1 on the definition of "petty offense") may be initiated by citation or violation notice, and such a document will suffice if a plea of guilty or *nolo contendere* is entered; but if such a case is to go to trial, then a complaint, information or indictment is necessary.

Subdivision (b) sets out the matters about which the defendant is to be informed by the magistrate at the initial appearance. Items (1) through (4), (7) and (8) essentially correspond to the responsibilities of a magistrate when the offense is not triable by him, as set out in Fed.R.Crim.P. 5(c) [Rule 5(c) Federal Rules of Criminal Procedure, this pamphlet]. Unique here is the requirement in item (1) that the defendant be informed of the maximum possible penalty, which has been added because it is a most relevant consideration in the defendant's decision whether to consent to trial before the magistrate. Items (5) and (6) supply information necessary to the defendant's decision whether to waive trial before a judge of the district court. Item (7) is limited in the way that it is because under 18 U.S.C. § 3060(e) [section 3060(e) of this title] there is no right to a preliminary hearing if an indictment is returned or an information filed. See also Fed.R.Crim.P. 5(c).

Much of what now appears in subdivision (b) was contained in rule 2(b) of the 1971 Magistrates Rules, a provision expressly covering only minor offenses other than petty offenses. The change reflects the judgment that the enumerated advice is important to all defendants, even those charged with petty offenses. (This has been the practice of most magistrates, who have not found the task burdensome; often much of the subdivision (b) advice can be given to a group of defendants collectively, and when each case is called the magistrate inquires if that defendant heard the advice.) The qualification in item (3) reflects the fact that except for misdemeanors other than petty offenses, for which representation by counsel is provided in 18 U.S.C. § 3006A [section 3006A of this title], appointment of counsel for an indigent defendant is required only if a sentence of imprisonment is

actually imposed. Scott v. Illinois, 99 S.Ct. 1158, 440 U.S. 367, 59 L.Ed.2d 383 (1979); Argersinger v. Hamlin, 92 S.Ct. 2006, 407 U.S. 25, 32 L.Ed.2d 530 (1972). The requirement in item (4) that the defendant be advised of his right to remain silent is new, and reflects the conclusion of many magistrates that all defendants, even in petty offense cases, are in need of such a warning. Items (5) and (6) in new subdivision (b) are in some respects different from what was required by the 1971 Magistrates Rules; these changes reflect the amendment of 18 U.S.C. § 3401 [section 3401 of this title] by the Federal Magistrate Act of 1979 [Pub.L. 96–82, Oct. 10, 1979, § 7(a), (b), 93 Stat. 645, 646].

Subdivision (c) deals with consent and arraignment, which were covered in rules 2(c) and 3(b) of the 1971 Magistrates Rules. No substantive change has been made other than to eliminate the requirement of jury trial waiver as part of the consent to be tried by a magistrate when the charge is not a petty offense. By virtue of the Federal Magistrate Act of 1979 [Pub.L. 96–82, Oct. 10, 1979, 93 Stat. 643], authorizing magistrates to conduct jury trials, such a waiver is not required. It should be noted that the defendant's consent in writing to be tried before a magistrate has been characterized as "a critical stage requiring the opportunity to consult counsel." S.Rep. 96–74, 96th Cong., 1st Sess. 7 (1979).

Under subdivision (c), trial within 30 days may occur only "upon consent of the defendant." Such consent is necessary because of 18 U.S.C. § 3161(c)(2) [section 3161(c)(2) of this title], which provides: "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."

Rule 3. Additional Procedures Applicable Only to Petty Offenses for Which No Sentence of Imprisonment will be Imposed

(a) Failure to Consent. If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed does not consent to trial before the magistrate, he shall be ordered to appear before a judge of the district court for further proceedings on notice. The file shall be transmitted forthwith to the clerk of the district court.

(b) Plea of Guilty or Nolo Contendere. No plea of guilty or *nolo contendere* to a petty offense for which no sentence of imprisonment will be imposed shall be accepted unless the magistrate is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law.

(c) Waiver of Venue for Plea and Sentence. A defendant charged with a petty offense for which no sentence of imprisonment will be imposed who is arrested, held, or present in a district other than that in which an indictment, information, complaint, citation or violation notice is pending against him may state in writing that he wishes to plead guilty or *nolo contendere*, to waive venue and trial in the district in which the proceeding against him is pending, and to consent to disposition of the case in the district in which he was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate in the district where the proceeding was originally commenced. The defendant's statement that he wishes to plead guilty or *nolo contendere* shall not be used against him.

(d) Sentence. If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed pleads guilty or *nolo contendere* or is found guilty after trial, the magistrate shall afford him an opportunity to be heard in mitigation. The magistrate shall then immediately proceed to sentence the defendant, except that in the discretion of the magistrate sentencing may be continued to allow an investigation by the probation service or the submission of additional information by either party.

(e) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the magistrate shall advise the defendant of his right to appeal.

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (a), which has no counterpart in the 1971 Magistrates Rules, addresses the situation in which a defendant charged with a petty offense for which no sentence of imprisonment will be imposed does not consent to trial before the magistrate. In the great majority of these cases, the offense will have been charged by a complaint, citation or violation notice, but pursuant to Fed.R.Crim.P. 7(a) [Rule 7(a), Federal Rules of Criminal Procedure, this pamphlet] may be prosecuted before a district judge only by indictment or information. Thus, while this new provision provides that the file shall be transmitted to the clerk of the district court, it is assumed that the clerk will then notify the attorney for the government, who will then decide whether the case merits prosecution before a district judge. In these circumstances, it should suffice that in the interim the defendant is ordered to appear before a judge of the district court for further proceedings on notice. (Removal by the government to a district judge for good cause is not dealt with in subdivision (a), as this procedure is set out in the Federal Magistrate Act of 1979 [Pub.L. 96–82, Oct. 10, 1979, 93 Stat. 643]).

Subdivision (b) sets out those matters which are deemed essential in receiving a plea of guilty or plea of *nolo contendere* to a petty offense for which no sentence of imprisonment will be imposed. Quite clearly the magistrate should be satisfied that the defendant understands the nature of the charge and the maximum penalty which could be imposed. Because this abbreviated procedure may be used only upon a prior determination that no imprisonment will be imposed, the defendant need not be

advised of any sentence of imprisonment provided for in the applicable statute.

Underlying subdivision (b) is the conclusion that the much more elaborate procedures provided for in Fed.R. Crim.P. 11 [Rule 11, Federal Rules of Criminal Procedure, this pamphlet] need not be routinely applied in petty offense cases for which no sentence of imprisonment will be imposed. Pursuant to rule 1(b) of these rules, however, a magistrate is free, as he deems appropriate, to selectively follow certain of the Fed.R.Crim.P. 11 procedures beyond those incorporated in this subdivision (b). By virtue of rule 1(b) of these rules, all of the Fed.R. Crim.P. 11 procedures are to be followed by magistrates as to offenses above the petty offense category, or for which a sentence of imprisonment will be imposed.

Subdivision (c), although based upon rule 6(b) and (c) of the 1971 Magistrates Rules, is different in certain significant respects. Under the 1971 rules, if the defendant waived trial in the district where the charge was pending, his statement to that effect was to be transmitted to the magistrate before whom the proceeding was pending, and that magistrate was then to transmit the papers or certified copies thereof to the clerk of the district court in which the defendant was arrested, held or present. That elaborate procedure, though generally following the provisions of Fed.R.Crim.P. 20 [Rule 20, Federal Rules of Criminal Procedure, this pamphlet], has proved troublesome in practice. The transmission of defendant's statement from one district to another, followed by transmission of the papers the other direction, has often resulted in serious delay, sometimes lasting several weeks. This delay may severely inconvenience the defendant who, especially in a petty offense case, may wish to plead guilty and complete the proceeding against him at the earliest possible time. To meet that concern, subdivision (c) provides for a waiver of venue in such cases. This will allow the filing of a new formal charge in the district where the defendant was arrested, is held or is present, to which the defendant may promptly plead without waiting for the transmission of papers from the district where that charge was first brought. Before imposing sentence, the magistrate will often find it useful to communicate with the magistrate in the district where the offense arose concerning the details of the offense. Because of the minor nature of the offense involved, the consent of the United States attorney in the district of the original charge is not required. This means, provided the case involves a petty offense for which no sentence of imprisonment will be imposed, that this waiver of venue for plea and sentence is a right of the defendant.

The last sentence of subdivision (c) applies only to a statement made in connection with waiver of venue. It does not apply to his later plea following the waiver.

Subdivision (d), concerned with sentencing in petty offense cases in which no sentence of imprisonment will be imposed, rests upon the conclusion that the more elaborate procedures of Fed.R.Crim.P. 32 [Rule 32, Federal Rules of Criminal Procedure, this pamphlet] need not be routinely followed in such cases. The first sentence, stating that the magistrate is obliged to permit the defendant to be heard before a sentencing, recognizes "the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation." Green v. United States, 81 S.Ct. 653, 365 U.S. 301, 5 L.Ed.2d 670 (1961). The last sentence recognizes that while often the circumstances in such a case will be such that the magistrate can properly immediately proceed to the matter of sentencing, this is not inevitably so. There will be occasions when the magistrate will want additional facts from the probation service or the parties. For example, when a case is before the magistrate for sentencing by virtue of subdivision (c) of this rule, it will occasionally be necessary for the magistrate to acquire additional facts from the district where the charge originated.

Subdivision (e) is new. The language follows that in Fed.R.Crim.P. 32(a)(2) [Rule 32(a)(2), Federal Rules of Criminal Procedure, this pamphlet].

Rule 4. Securing Defendant's Appearance; Payment in Lieu of Appearance

(a) Forfeiture of Collateral. When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable types of misdemeanor cases in lieu of appearance and as authorizing the termination of the proceedings. Such local rules may make provision for increases in such fixed sums not to exceed the maximum fine which could be imposed upon conviction.

(b) Notice to Appear. If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk of the district court or a magistrate may issue a notice for the defendant to appear before a magistrate on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to his last known address.

(c) Summons or Warrant. Upon an indictment or a showing by one of the other documents specified in Rule 2(a) of probable cause to believe that a misdemeanor has been committed and that the defendant has committed it, a magistrate may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the magistrate. If the defendant fails to appear before the magistrate in response to a summons, the magistrate may summarily issue a warrant for his immediate arrest and appearance before the magistrate.

NOTES OF ADVISORY COMMITTEE ON RULES

The first sentence of subdivision (a) is derived from rule 9 of the 1971 Magistrates Rules. It recognizes that forfeiture of collateral without appearance is an accepted way of terminating proceedings as to minor traffic offenses and similar infractions. See ABA Standards for Traffic Justice § 3.4 (1975). While the earlier provision permitted such disposition only "in cases of petty offenses," it is now provided that this procedure may be

authorized by local rules "in suitable types of misdemeanor cases." This change is necessitated by the peculiarities to be found in some state codes, whereby violations which should logically be classified as petty offenses are in fact above the petty offense category because of the high penalties which are authorized by law (but seldom if ever imposed). Local rules can identify those situations with greater specificity than is feasible in this rule, such as that certain specified misdemeanors may be dealt with in this way only for first offenders. It must be emphasized, however, that the aforementioned change in the rule is limited in nature; it is intended to apply only to misdemeanors of the *malum prohibitum* variety. The last sentence of subdivision (a) expressly recognizes, as some local rules now provide, that the amount of collateral to be forfeited may increase as the case reaches later stages (e. g., after the defendant fails to respond to a violation notice or a notice to appear).

Rule 4 of the 1971 Magistrates Rules provides that if a defendant fails to appear in response to a citation or violation notice, a summons or arrest warrant may issue. That rule expressly states that a warrant may issue only upon probable cause, but no comparable declaration is made with respect to issuance of a summons. However, subdivision (b) of that rule declares that a warrant "may summarily issue" if a defendant fails to comply with a summons. In practice, these provisions have received a variety of interpretations. Some magistrates have construed these provisions literally and thus have reached the conclusion that without any probable cause showing to the magistrate at any time (that is, either before the summons issues or before the warrant issues after noncompliance with the summons), a warrant of arrest may be issued and executed. Others, perhaps drawing upon the interpretation which has been placed upon the summons provisions in Fed.R.Crim.P. 4 and 9 [Rules 4 and 9, Federal Rules of Criminal Procedure, this pamphlet], see United States v. Millican, 600 F.2d 273 (5th Cir. 1979); United States v. Greenberg, 320 F.2d 467 (9th Cir. 1963), have read the provision that a warrant may summarily issue upon noncompliance with a summons as meaning that the summons must have itself been issued upon a showing of probable cause. There has also been some variation in practice as to the service of summonses under the 1971 rules; in some localities, a summons for a petty offense is served in a less formal manner than a Fed.R. Crim.P. 4 summons.

Present rule 4 differs from its predecessor in that it gives express recognition to two different follow-up procedures short of arrest: a notice to appear, and a summons. These two procedures, because they are different in several significant respects, avoid constitutional issues which might otherwise arise and provide greater flexibility in the follow-up process. (This flexibility should aid in addressing a problem of considerable dimensions. During the statistical year 1978 there were 437,000 violation notices filed by law enforcement agencies with the district courts; some 50,000 of those were referred directly to magistrates for a mandatory hearing, while another 80,000 were referred to magistrates for "follow-up" because of the failure of the defendant to respond to the instructions on the violation notice or subsequent warnings sent by the Central Violations Bureau.)

A notice to appear, on the one hand, is in the nature of a reminder or warning letter. Either the clerk of the court or a magistrate may issue a notice to appear. It may be issued without the kind of probable cause showing needed for a warrant or a summons; it will suffice that the defendant has failed to pay a fixed sum under subdivision (a), to request a hearing, or to appear in response to a citation or violation notice. The notice to appear calls upon the defendant to appear before a magistrate on a certain date, but may also afford the defendant a further opportunity to utilize the convenient alternative of forfeiting collateral in lieu of making an appearance. Moreover, the notice may be served simply by sending a copy to defendant's last known address. The defendant's non-compliance with the notice to appear carries no immediate adverse consequences; an arrest warrant may not issue merely because of nonappearance following this notice, as the notice itself issued without a probable cause determination.

A summons, on the other hand, may be issued only by a magistrate, and only upon a showing of probable cause supported by oath. It is to be served in the same manner as a Fed.R.Crim.P. 4 [Rule 4, Federal Rules of Criminal Procedure, this pamphlet] summons. Because probable cause must be established before the summons issues, the magistrate *may* summarily issue a warrant for the defendant's arrest if the defendant fails to appear when summoned.

New rule 4, by expressly recognizing both a notice to appear and a summons as permissible follow-up procedures, provides needed flexibility. In some localities or on some occasions, the notice-to-appear device may prove to be the best alternative, as such a notice may issue without a case-by-case probable cause determination and may be served without difficulty. Elsewhere or on other occasions, the circumstances may make the summons alternative more appropriate. It is permissible to use them in tandem; that is, a defendant who failed to respond to a notice to appear might then be served with a summons rather than an arrest warrant, as he might take more seriously the latter, more formal directive to appear. It must be emphasized, however, that rule 4 does not grant any right to a defendant to be dealt with in this sequence. Provided the requirements of subdivision (c) are met, a summons may issue without prior resort to the notice-to-appear alternative, and a warrant may issue without first trying the summons alternative. Pursuant to the first sentence of subdivision (c), the magistrate may ordinarily decide on his own whether a warrant or summons is most appropriate; it is only in the exceptional case in which the U. S. Attorney requests a warrant that the magistrate may not resort to the summons alternative. This departure from the policy of Fed.R.Crim.P. 4(a) [Rule 4(a) Federal Rules of Criminal Procedure, this pamphlet], whereunder a warrant is to issue unless a summons is requested, is justified by the fact that the U. S. Attorney will often not be involved in these minor cases.

By expressly recognizing both a notice to appear and a summons as follow-up alternatives and further providing that only the latter (i) requires a probable cause showing and (ii) permits summary issuance of a warrant upon defendant's nonappearance, new Rule 4 ensures that the

follow-up procedures are not vulnerable to attack on Fourth Amendment grounds.

> If a summons could be issued on an information not supported by oath, and a warrant then issued for failure to appear in response to the summons, the end result would be that defendant could be arrested on warrant though there had never been a showing under oath of probable cause. This is not permissible.

1 C. Wright, Federal Practice and Procedure § 151 at 342 (1969). See also United States v. Millican, supra (probable cause required for summons under Fed.R.Crim.P. 9); United States v. Greenberg, supra (probable cause required for summons under Fed.R.Crim.P. 4). While it is said in United States v. Evans, 574 F.2d 352 (6th Cir. 1978), that a bench warrant issued solely on the basis of the defendant's failure to appear on a traffic citation "is clearly valid and based on probable cause," it is significant that this comment was made with respect to practice in a state where such nonappearance is itself a criminal offense. That is not true in the federal system. 18 U.S.C. § 3150 [section 3150 of this title].

As previously noted, issuance of either a summons or an arrest warrant requires a showing of probable cause under oath. If that showing could be made only by the police officer who earlier issued the citation or violation notice now appearing in person before the magistrate, the result would be a most inefficient use of scarce law enforcement resources. However, the Fourth Amendment does not require such an appearance, nor does new rule 4(c), which expressly recognizes that "the affiant need not appear before the magistrate." This means that a magistrate may issue an arrest warrant or a summons under subdivision (c) merely by reviewing a document which the officer completed on an earlier occasion (most likely at the time the officer gave the citation to the defendant). Such a procedure is constitutionally permissible *provided* that this document is prepared in such a way that it conforms to two important Fourth Amendment requirements: (i) that the warrant be upon probable cause "supported by Oath or affirmation"; and (ii) that the magistrate himself decide the probable cause issue based upon facts, and not merely conclusions, supplied to him.

It is clear that the Fourth Amendment oath requirement does not require a personal appearance of the affiant before the magistrate issuing the warrant; "it is the oath itself and not the face-to-face confrontation which is mandated by and which is at the core of the Fourth Amendment requirement." State v. Cymerman, 135 N.J.Super. 591, 343 A.2d 825 (1975). This means, for example, that a warrant may constitutionally issue upon sworn oral testimony communicated by telephone or similar means, as is authorized by Fed.R.Crim.P. 41(c)(2) [Rule 41(c)(2), Federal Rules of Criminal Procedure, this pamphlet]. See United States v. Turner, 558 F.2d 46 (2d Cir. 1977); People v. Peck, 38 Cal.App.3d 993, 113 Cal. Rptr. 806 (1974); State v. Cymerman, supra; Advisory Committee Note to 1977 amendment to Fed.R.Crim.P. 41.

Indeed, the Fourth Amendment does not require that an oath be administered by the magistrate issuing the warrant or, for that matter, by some other person such as a notary public. Rather, the "true test" as to whether the Fourth Amendment oath requirement has been met is whether the procedures followed were such "that perjury could be charged therein if any material allegation contained therein is false." Simon v. State, 515 P.2d 1161 (Okla.Crim.1973). See also United States v. Turner, supra (variation from usual oath-taking procedures constitutionally permissible provided "the legal significance of the undertaking remains the same"); United States ex rel. Pugh v. Pate, 401 F.2d 6 (7th Cir. 1968) (false-name affidavit unconstitutional because "someone must take the responsibility for the facts alleged"; court appears to assume false name would bar perjury prosecution); State ex rel. Purcell v. Superior Court, 109 Ariz. 460, 511 P.2d 642 (1973) (unsworn uniform traffic ticket and complaint sufficient as charge under state law, but if it is to be used to obtain an arrest warrant then it is necessary that "the officer's certification of the complaint is done under the penalty of perjury"); State v. Cymerman, supra (what constitution requires is procedure whereby officer could not "avoid the sanction for perjury or false swearing by supplying false information"); State v. Douglas, 71 Wash.2d 303, 428 P.2d 535 (1967) (all the formalities of swearing not necessary if enough was done so that the officer "could be held responsible if the statements in the affidavit he signed had been false").

This means, therefore, that if a magistrate receives a document which by its form and manner of preparation could be the basis of a criminal prosecution of the maker if the material facts alleged therein were known by him to be false, the magistrate may constitutionally issue a warrant based upon that document without having the maker appear before him or otherwise communicate with him further. Illustrative is In re Walters, 15 Cal.3d 738, 126 Cal.Rptr. 239, 543 P.2d 607 (1975) holding that a magistrate's finding of probable cause required by the Fourth Amendment was properly based upon "arrest and follow-up reports [which] were written and signed by the arresting officer under penalty of perjury." In the federal system, this "penalty of perjury" requirement can be met by complying with 28 U.S.C. § 1746 [section 1746 of Title 28, U.S.C.A., Judiciary and Judicial Procedure], which reads:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> * * *
>
> (2) If executed within the United States, its territories, possessions or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."

Assuming now that the document submitted to the magistrate meets the oath requirement of the Fourth Amendment in the manner just described, it will still not meet constitutional requirements unless the form of the

document is such that it communicates facts and not just conclusions. The Fourth Amendment requirement of probable cause for issuance of an arrest warrant means that before such a warrant may constitutionally issue it is necessary "that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." Whiteley v. Warden, 91 S.Ct. 1031, 401 U.S. 560, 28 L.Ed.2d 306 (1971). This is not the case when the document supplied to the magistrate merely sets out the officer's conclusion that a specified person has committed a specified offense. Whiteley v. Warden, supra; Giordenello v. United States, 78 S.Ct. 1245, 357 U.S. 480, 2 L.Ed.2d 1503 (1958).

The Uniform Traffic Ticket and Complaint is commonly utilized in state traffic law enforcement. Some have urged that it be adopted for use in federal traffic enforcement as well, while others have noted that certain citation and violation notice forms currently utilized in the federal system for charging minor offenses are in many respects similar to it. This being the case, it must be emphasized that issuance of either an arrest warrant or a summons under rule 4(c) in the manner heretofore described requires a somewhat different type of document. For one thing, the Uniform Traffic Ticket and Complaint or any comparable document which merely identifies the offense charged cannot be used alone to establish probable cause, as it "amounts to nothing more than a mere conclusionary assertion by the complaining officer that defendant committed the offense charged." State v. Miernik, 284 Minn. 316, 170 N.W.2d 231 (1969). For another, in order to comply with the Fourth Amendment oath requirement without the necessity of the officer appearing before the magistrate or some other official, the language specified in 28 U.S.C. § 1746 [section 1746 of Title 28, U.S.C.A., Judiciary and Judicial Procedure] should be utilized.

Thus, in order to take advantage of the simplified procedure in rule 4(c), any complaint, citation or violation notice forms which are to be used as a basis for warrant or summons issuance should be revised (or "amended" by a hand stamp, as is now being done in some localities) to include essentially the following:

On ....., 19..., while exercising my duties as a law enforcement officer at or near ..... in the ..... District of ....., I observed .....
.....
.....
.....
.....
.....

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed this ..... day of ....., 19....

.....
(signature)

.....
(print name and title)

Probable cause has been stated for the issuance of a warrant for the arrest of the offender named or identified herein.

.....
(date)

.....
United States Magistrate

Rule 5. Record

Proceedings under these rules shall be taken down by a reporter or recorded by suitable sound recording equipment. In the discretion of the magistrate or, in the case of a misdemeanor other than a petty offense, on timely request of either party as provided by local rule, the proceedings shall be taken down by a reporter. With the written consent of the defendant, the keeping of a verbatim record may be waived in petty offense cases.

NOTES OF ADVISORY COMMITTEE ON RULES

The first sentence of rule 5 is broader than rules 2(d)(3) and 3(c)(2) of the 1971 Magistrates Rules, both of which apply to trial proceedings only. The change reflects the fact that it is often desirable to make a record of other proceedings, such as an evidentiary hearing on a motion. Making a record encourages greater formality and dignity in the conduct of the proceedings, and provides the basis for meaningful appeal.

The second sentence recognizes that the magistrate in his discretion may require that the proceedings be taken down by a reporter. A magistrate might well conclude that use of sound recording equipment would be insufficient when, for example, the case is to be tried before a jury or is likely to be appealed in the event of a conviction. The second sentence also recognizes that, in cases involving more than a petty offense, the parties should be entitled upon timely request to a record made by a reporter.

In recognizing that a defendant in a petty offense case may waive the keeping of a verbatim record, the third sentence of rule 5 conforms to rule 3(c)(2) of the 1971 Magistrates Rules. However, the rule does not contemplate the routine obtaining of waivers in petty offense cases. While it is desirable to permit the defendant in a petty offense case to avoid delay by waiving the making of a verbatim record when, e. g., recording equipment is temporarily not functioning, absent such exigent circumstances there should be no need to seek a waiver of the recording requirement.

Rule 6. New Trial

The magistrate, on motion of a defendant, may grant a new trial if required in the interest of justice. The magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after a finding of guilty or within such further time as the magistrate may fix during the 7-day period.

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 6 is identical to rule 7 in the 1971 Magistrates Rules, except that the time within which a motion for a new trial based on newly discovered evidence may be made has been changed to two years so as to conform to Fed.R.Crim.P. 33 [Rule 33, Federal Rules of Criminal Procedure, this pamphlet]. This subject matter has been retained in the magistrates rules to emphasize this change. By comparison, a motion to withdraw a plea is *not* dealt with in these rules. By virtue of rule 1(b), Fed.R.Crim.P. 32(d) [Rule 32(d), Federal Rules of Criminal Procedure, this pamphlet] will apply except for petty offenses for which no sentence of imprisonment will be imposed, and as to those offenses rule 1(b) permits resort to Fed.R.Crim.P. 32(d).

Rule 7. Appeal

(a) Interlocutory Appeal. A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of the district court a statement specifying the decision or order from which an appeal is taken, and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate.

(b) Appeal from Conviction. An appeal from a judgment of conviction by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of the district court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate.

(c) Record. The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly by the magistrate to the clerk of the district court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(d) Stay of Execution; Release Pending Appeal. The provisions of Rule 38(a) of the Federal Rules of Criminal Procedure relating to stay of execution shall be applicable to a judgment of conviction entered by a magistrate. The defendant may be released pending appeal by the magistrate or a district judge in accordance with the provisions of law relating to release pending appeal from a judgment of conviction of a district court.

(e) Scope of Appeal. The defendant shall not be entitled to a trial *de novo* by a judge of the district court. The scope of appeal shall be the same as on an appeal from a judgment of a district court to a court of appeals.

References in Text. The Federal Rules of Criminal Procedure, referred to in subsec. (d), are set out in this pamphlet.

NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (a) of new rule 7 deals with those decisions or orders of a magistrate (e. g., the granting of a pretrial motion to suppress evidence) which, if made by a judge of the district court, could be appealed by the government (e. g., the granting of a pretrial motion to suppress evidence) or the defendant (e. g., denial of a motion to dismiss the charge on double jeopardy grounds, Abney v. United States, 97 S.Ct. 2034, 431 U.S. 651, 52 L.Ed.2d 651 (1977)). Rule 5 of the 1971 Magistrates Rules, dealing only with appeal by the government, provided that such a decision or order "shall be subject to rehearing *de novo* by a judge of the district court upon motion for such rehearing filed with the magistrate by the attorney for the government within 10 days after entry of the order." That provision, because it provided for a *de novo* rehearing by a district judge rather than appeal to a judge, was inconsistent with the adjudicatory authority of magistrates in cases lying within their own trial jurisdiction. Consequently, it has been modified so as to provide for interlocutory appeal and has been relocated with the other appeal provisions.

Subdivisions (b) through (e) are virtually unchanged from their counterparts in the 1971 rules, subdivisions (a) through (d) of rule 8. Subdivision (b), as does subdivision (a), now provides that appeal is to be taken by filing the notice of appeal with the clerk of court rather than the magistrate, as this will facilitate prompt action by the clerk to get the case into the assignment system.

Although the first sentence of subdivision (c) continues the requirement that the magistrate transmit the record to the clerk, it must be noted that the magistrate is a part of the district court and that the clerk may be keeping the record for the magistrate, in which case there may be no reason to "transmit" anything. If there are several trials on a single tape, it is permissible to transmit a certified copy of the portion of the tape relating to the case appealed. The last sentence of new subdivision (c) replaces a sentence which merely stated: "Any expense in connection therewith shall be borne by the government." This change makes the rules consistent with 18 U.S.C. § 3401(e) [section 3401(e) of this title], which requires a showing of indigency in order for the Director to pay transcript costs. The language should not be read as depriving the magistrate of the authority to determine if the affidavit is bona fide and sufficient.

Rule 8. Local Rules

Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsist-

ent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

NOTES OF ADVISORY COMMITTEE ON RULES

Rule 8 is identical to subdivision (a) of rule 11 in the 1971 Magistrates Rules.

Subdivision (b) of the 1971 Rules (reading: "If no procedure is especially prescribed by rule, the magistrate may proceed in any lawful manner not inconsistent with these rules or with an applicable statute") has not been retained. That language has been the cause of some confusion among magistrates, especially as to the applicability of the Federal Rules of Criminal Procedure [this pamphlet] to proceedings before magistrates. That issue is now dealt with more directly in new rule 1.

Rule 9. Definition

As used in these rules, "petty offense" means a Class B or C misdemeanor or an infraction.

(Added Pub.L. 98–473, Title II, § 216(a), Oct. 12, 1984, 98 Stat. 2017.)

Effective Date. Section 235 of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 2031, provided that this rule is effective on Nov. 1, 1986.

FEDERAL RULES OF EVIDENCE

FOR

UNITED STATES COURTS

AND

MAGISTRATES

Pub.L. 93–595, § 1, January 2, 1975, 88 Stat. 1926

As amended to January 1, 1985

EFFECTIVE DATE AND APPLICABILITY

Section 1 of Pub.L. 93–595 provided in part: "That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [January 2, 1975]. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply."

For legislative history and purpose of Pub.L. 93–595, see 1974 U.S. Code Congressional and Administrative News, p. 7051.

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ORDERS OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES

ORDER OF NOVEMBER 20, 1972

1. That the rules hereinafter set forth, to be known as the Federal Rules of Evidence, be, and they hereby are, prescribed pursuant to Sections 3402, 3771, and 3772, Title 18, United States Code, and Sections 2072 and 2075, Title 28, United States Code, to govern procedure, in the proceedings and to the extent set forth therein, in the United States courts of appeals, the United States district courts, the District Court for the District of the Canal Zone and the district courts of Guam and the Virgin Islands, and before United States magistrates.

2. That the aforementioned Federal Rules of Evidence shall take effect on July 1, 1973, and shall be applicable to actions and proceedings brought thereafter and also to further procedure in actions and proceedings then pending, except to the extent that in the opinion of the court their application in a particular action or proceeding then pending would not be feasible or would work injustice in which event the former procedure applies.

3. *[Certain rules of Civil Procedure for the United States District Courts amended]*

4. That subdivision (c) of Rule 32 of the Federal Rules of Civil Procedure be, and it hereby is, abrogated, effective July 1, 1973.

5. That Rules 26, 26.1 and 28 of the Federal Rules of Criminal Procedure be, and they hereby are, amended effective July 1, 1973, to read as hereinafter set forth.

[See amendments made thereby under the respective rules, ante]

6. That the Chief Justice be, and he hereby is, authorized to transmit the foregoing new rules and amendments to and abrogation of existing rules to the Congress

at the beginning of its next regular session, in accordance with the provisions of Title 18, U.S.C. § 3771 and Title 28, U.S.C. §§ 2072 and 2075.

CONGRESSIONAL ACTION ON PROPOSED RULES OF EVIDENCE AND 1972 AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF CRIMINAL PROCEDURE

Pub.L. 93-12, Mar. 30, 1973, 87 Stat. 9, provided: "That notwithstanding any other provisions of law, the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, and Monday, December 18, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress."

Pub.L. 93-595, § 3, Jan. 2, 1975, 88 Stat. 1959, provided that: "The Congress expressly approves the amendments to the Federal Rules of Civil Procedure, and the amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [Jan. 2, 1975]."

ORDER OF APRIL 30, 1979

1. That Rule 410 of the Federal Rules of Evidence be, and it hereby is, amended to read as follows:

[See Appendix to this Pamphlet]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on November 1, 1979, and shall be applicable to all proceedings then pending except to the extent that in the opinion of the court the application of the amended rule in a particular proceeding would not be feasible or would work injustice.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of 28 U.S.C. § 2076.

CONGRESSIONAL ACTION ON AMENDMENT PROPOSED APRIL 30, 1979

Pub.L. 96-42, July 31, 1979, 93 Stat. 326, provided that the amendment proposed and transmitted to the Federal Rules of Evidence affecting rule 410, shall not take effect until Dec. 1, 1980, or until and then only to the extent approved by Act of Congress, whichever is earlier.

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code § 2, and New Jersey Evidence Rule 5.

Rule 103. Rulings on Evidence

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making

statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). Subdivision (d) states the law as generally accepted today. Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these objectives. For similar provisions see Uniform Rules 4 and 5; California Evidence Code §§ 353 and 354; Kansas Code of Civil Procedure §§ 60–404 and 60–405. The rule does not purport to change the law with respect to harmless error. See 28 U.S.C. § 2111, F.R.Civ.P. 61, F.R.Crim.P. 52, and decisions construing them. The status of constitutional error as harmless or not is treated in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), reh. denied *id.* 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241.

Subdivision (b). The first sentence is the third sentence of Rule 43(c) of the Federal Rules of Civil Procedure virtually verbatim. Its purpose is to reproduce for an appellate court, insofar as possible, a true reflection of what occurred in the trial court. The second sentence is in part derived from the final sentence of Rule 43(c). It is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for a possible final disposition of the case in the event of reversal of a ruling which excluded evidence. See 5 Moore's Federal Practice § 43.11 (2d ed. 1968). Application is made discretionary in view of the practical impossibility of formulating a satisfactory rule in mandatory terms.

Subdivision (c). This subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. *Bruton* v. *United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968). Rule 43(c) of the Federal Rules of Civil Procedure provides: "The court may require the offer to be made out of the hearing of the jury." *In re McConnell*, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), left some doubt whether questions on which an offer is based must first be asked in the presence of the jury. The subdivision answers in the negative. The judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed at best to waste time and at worst "to waft into the jury box" the very matter sought to be excluded.

Subdivision (d). This wording of the plain error principle is from Rule 52(b) of the Federal Rules of Criminal Procedure. While judicial unwillingness to be constructed by mechanical breakdowns of the adversary system has been more pronounced in criminal cases, there is no scarcity of decisions to the same effect in civil cases. In general, see Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 7 Wis.L.Rev. 91, 160 (1932); Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L.Rev. 477 (1958–59); 64 Harv.L.Rev. 652 (1951). In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

NOTES OF THE ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, Basic Problems of Evidence 45–50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made

whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term "questions," without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for "conditional relevancy" in subdivision (b) and those for confessions in subdivision (d).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are "scattered and inconclusive," and observes:

"Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant "so far as appears [has] had an opportunity to observe the fact declared." McCormick, § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 47 of the Federal Rules of Criminal Procedure provides:

"An application to the court for an order shall be by motion * * * It may be supported by affidavit."

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

"When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows:

"In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 470 (1962). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides:

"In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege."

Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy." Morgan, Basic Problems of Evidence 45–46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g. evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, *supra;* California Evidence Code § 403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof here, as generally, is subject to the control of the judge.

Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See *Jackson* v. *Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

Subdivision (d). The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a

hearing on a preliminary matter. See *Walder* v. *United States*, 347 U.S. 62 (1954); *Simmons* v. *United States*, 390 U.S. 377 (1968); *Harris* v. *New York*, 401 U.S. 222 (1971).

Subdivision (e). For similar provisions see Uniform Rule 8; California Evidence Code § 406; Kansas Code of Civil Procedure § 60–408; New Jersey Evidence Rule 8(1).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

A close relationship exists between this rule and Rule 403 which requires exclusion when "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In *Bruton* v. *United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; California Evidence Code § 355; Kansas Code of Civil Procedure § 60–406; New Jersey Evidence Rule 6. The wording of the present rule differs, however, in repelling any implication that limiting or curative instructions are sufficient in all situations.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severance in a multi-defendant case.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick § 56; California Evidence Code § 356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of "adjudicative" facts. No rule deals with judicial notice of "legislative" facts. Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404–407 (1942). The following discussion draws extensively upon his writings. In addition, see the same author's Judicial Notice, 55 Colum.L.Rev. 945 (1955); Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

"My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly * * * within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable." A System of Judicial Notice Based on Fairness and Convenience, *supra*, at 82.

An illustration is *Hawkins* v. *United States*, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." This conclusion has a large intermixture of fact, but the factual aspect is scarcely "indisputable." See Hutchins and Slesinger, Some Observations on the Law of Evidence—Family Relations, 13 Minn.L.Rev. 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

"If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs as its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom 'clearly' indisputable." Davis, *supra*, at 83.

"Professor Morgan gave the following description of the methodology of determining domestic law:

"In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. * * * [T]he parties do no more than to assist; they control no part of the process." Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 270–271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording

opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of nonadjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

"In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgement and efficiency, is imputed to judges and juries as part of their necessary mental outfit." Thayer, Preliminary Treatise on Evidence 279–280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum.* These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U.Pa.L.Rev. 139 (1956).

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In *People* v. *Strook*, 347 Ill. 460, 179 N.E. 821 (1932), venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. *People* v. *Pride*, 16 Ill.2d 82, 156 N.E.2d 551 (1951). And in *Hughes* v. *Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a "rhetorical and illustrative" way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a non-suit was properly granted. *Ennis* v. *Dupree*, 262 N.C. 224, 136 S.E.2d 702 (1964). See also *Brown* v. *Hale*, 263 N.C. 176, 139 S.E.2d 210 (1964); *Clayton* v. *Rimmer*, 262 N.C. 302, 136 S.E.2d 562 (1964). It is apparent that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are "adjudicative" facts? Davis refers to them as those "which relate to the parties," or more fully:

"When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. * * *

"Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." 2 Administrative Law Treatise 353.

Subdivision (b). With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

"The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention." A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id.*, 94.

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those "so universally known that they cannot reasonably be the subject of dispute," those "so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and those "capable of immediate and accurate determination by resort to easily accessible sources of indisputable

accuracy." The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick §§ 324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court, *Id.* § 327, and other governmental facts, *Id.* § 328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. California Evidence Code §§ 451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase "propositions of generalized knowledge," found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his "legislative" capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a "proposition of generalized knowledge" as an "adjudicative" fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of "propositions of generalized knowledge" in a variety of situations: determining the validity and meaning of statutes, formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCormick 712. It is not believed that judges now instruct juries as to "propositions of generalized knowledge" derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see *Sayers* v. *Gardner*, 380 F.2d 940 (6th Cir. 1967); *Ross* v. *Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sosna* v. *Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); *Glendenning* v. *Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962).

Subdivisions (c) and (d). Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in California Evidence Code §§ 451–453 and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

Subdivision (e). Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the Administrative Procedure Act, 5 U.S.C. § 556(e). See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. § 10(4) (Supp. 1967).

Subdivision (f). In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code § 459; Kansas Rules of Evidence § 60–412; New Jersey Evidence Rule 12; McCormick § 330, p. 712.

Subdivision (g). Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore § 2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law, 69, 76–77 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, 2 Stan.L.Rev. 664, 668 (1950); McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Whitmore Controversy, 14 Vand.L.Rev. 779 (1961); Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 279 (1944); McCormick 710–711. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts lose their relevancy.

Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. *People* v. *Mayes*, 113 Cal. 618, 45 P. 860 (1896); *Ross* v. *United States*, 374 F.2d 97 (8th Cir. 1967). Cf. *State* v. *Main*, 94 R.I. 338, 180 A.2d 814 (1962); *State* v. *Lawrence*, 120 Utah 323, 234 P.2d 600 (1951).

Note on Judicial Notice of Law. By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 [deleted] for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv.L.Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv.L.Rev. 59, 82 (1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959).

The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. Morgan and Maguire, *supra*, at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K.C.R. Co.* v. *Turnipseed*, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910), the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co.* v. *Henderson*, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), the Court overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing colli-

sion, due to specified acts of negligence by defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in *Turnipseed* in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the difference between a derailment and a grade crossing collision of no significance? Would the *Turnipseed* presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its "rational connection"? If *Henderson* forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain *Henderson*. The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as *Turnipseed* intimated might be done ("considerations of public policy arising out of the character of the business"), and the structure of the decision in *Henderson* fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. The problem would be one of economic due process only. While it seems likely that the Supreme Court of 1929 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the non-existence of the presumed fact in civil cases is laid at rest by *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). The Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." 359 U.S. at 443, 79 S.Ct. at 925.

"In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id.* at 446, 79 S.Ct. at 927.

The rational connection requirement survives in criminal cases, *Tot* v. *United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of *Ferry* v. *Ramsey*, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 (1928). In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was prima facie evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id.* at 94, 48 S.Ct. at 444. Mr. Justice Sutherland dissented: though the state could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not encompass them. "Rational connection" is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, *United States* v. *Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), but not that Romano should have known that his presence at a still could convict him of possessing it, *United States* v. *Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965).

In his dissent in Gainey, Mr. Justice Black put it more artistically:

"It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called 'possession' and 'carrying on an illegal distillery business' but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry* v. *Ramsey*, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner* v. *Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888, and many other cases." 380 U.S. at 84, n. 12, 85 S.Ct. at 766.

And the majority opinion in *Romano* agreed with him:

"It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgement of Congress, the former may not constitutionally be inferred from the latter." 382 U.S. at 144, 86 S.Ct. at 284.

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 301 as submitted by the Supreme Court provided that in all cases a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The Committee limited the scope of Rule 301 to "civil actions and proceedings" to effectuate its decision not to deal with the question of presumptions in criminal cases. (See note on [proposed] Rule 303 in discussion of Rules deleted). With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgement implicit in the Court's version that the so called "bursting bubble" theory of presumptions, whereby a presumption vanished upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced—a view shared by only a few courts—lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

The rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." This treatment requires juries to perform the task of considering "as evidence" facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck* v. *Sarver* [20 Cal.2d 585, 128 P.2d 16, 21 (1942)] and was repealed after 93 troublesome years [Cal. Ev. Code 1965 § 600].

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

* * * * * *

> Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence", to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence. [McCormick, Evidence, 669 (1954); *Id.* 825 (2d ed. 1972)].

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden or persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

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A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), and *Dick* v. *New York Life Ins. Co.*, 259 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchasers, contributory negligence, and non-accidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. "tactical" presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. *Vestal, Erie R.R.* v. *Tompkins:* A Projection, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, The Federal Courts and the Federal System, 697 (1953); 1A Moore, Federal Practice ¶ 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217–218 (1963). Hence the rule employs, as appropriately descriptive, the phrase "as to which state law supplies the rule of decision." See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, § 2344(c), p. 40, P.F.D. No. 1 (1965).

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence 45–46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, "* * * [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of

avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10–11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code § 210, defining relevant evidence in terms of tendency to prove a disputed fact.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see California Evidence Code §§ 350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60–407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory* v. *United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501(c).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. § 1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. § 3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. § 8693, same as to Air Force; 11 U.S.C. § 25(a)(10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. § 205(a), railroad reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. § 403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. § 9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. § 605, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L.Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Van.L.Rev. 385, 392 (1952); McCormick § 152, pp. 319-321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for

negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155–161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581–583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657–658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *Id.*, 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'." It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson* v. *United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An oft-quoted paragraph, McCormick, § 162, p. 340, describes habit in terms effectively contrasting it with character:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's

tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

"Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it."

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate "habits" is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In *Levin* v. *United States*, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), testimony as to the religious "habits" of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded;

"It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38–41 (1957). Nor are they inconsistent with such cases as *Whittemore* v. *Lockheed Aircraft Corp.*, 65 Cal. App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste* v. *New York, N.H. & H.R. Co.*, 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed. 1475, 10 Vand.L.Rev. 447 (1957); McCormick § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code § 1105.

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart* v. *Lancashire & Yorkshire Ry. Co.*, 21 L.T.R.N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered

as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co.* v. *Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers* v. *J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60–451; New Jersey Evidence Rule 51.

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of Rule 68 of the Federal Rules of Civil Procedure that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540–541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see California Evidence Code §§ 1152, 1154.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lessor sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, *contra*, *Fenberg* v. *Rosenthal*, 348 Ill.App. 510, 109 N.E.2d 402 (1952), and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code §§ 1152, 1154; Kansas Code of Civil Procedure §§ 60–452, 60–453; New Jersey Evidence Rules 52 and 53.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations

begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until "compromise negotiations" began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are excepted from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible.

The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form [See House Report No. 93-650 above]. The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary.

Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations. [Nev. Rev. Stats. § 48.105; N. Mex. Stats. Anno. (1973 Supp.) § 20-4-408; West's Wis. Stats. Anno. (1973 Supp.) § 904.08].

For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

"[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of "humanitarian motives," see Uniform Rule 52; California Evidence Code § 1152; Kansas Code of Civil Procedure § 60-452; New Jersey Evidence Rule 52.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

(As amended Pub.L. 94–149, § 1(9), Dec. 12, 1975, 89 Stat. 805; Apr. 30, 1979, eff. Dec. 1, 1980.)

References in Text. The Federal Rules of Criminal Procedure, referred to in text, are set out in this pamphlet.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval* v. *United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People* v. *Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. *General Electric Co.* v. *City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir. 1963), cert. denied 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659; *Armco Steel Corp.* v. *North Dakota*, 376 F.2d 206 (8th Cir. 1967); *City of Burbank* v. *General Electric Co.*, 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543.

"Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also *People* v. *Hamilton*, 60 Cal.2d 105, 32 Cal. Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of nolo contendere. See 15 U.S.C. 16(a). The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted.

NOTES OF THE COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

As adopted by the House, rule 410 would make inadmissible pleas of guilty or nolo contendere subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendant would be able to contradict his previous state-

ments and thereby lie with impunity [See *Harris* v. *New York*, 401 U.S. 222 (1971)]. To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The House bill provides that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed Rule 11(e)(6) of the Federal Rules of Criminal Procedure presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or nolo contendere, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and nolo contendere pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during Congressional consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions.

1975 AMENDMENT

Pub.L. 94–149 substituted heading reading "Inadmissibility of Pleas, Offers of Pleas, and Related Statements" for "Offer to Plead Guilty; Nolo Contendere; Withdrawn Pleas of Guilty"; substituted in first sentence "provided in this rule" for "provided by Act of Congress", inserted therein ", and relevant to," following "in connection with", and deleted therefrom "action, case, or" preceding "proceeding"; added second sentence relating to admissibility of statements in criminal proceedings for perjury or false statements; deleted former second sentence providing that "This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement."; and deleted former second par. providing that "This rule shall not take effect until August 1, 1975, and shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence."

1979 AMENDMENT

Present rule 410 conforms to rule 11(e)(6) of the Federal Rules of Criminal Procedure. A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence; see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id.*

For similar rules see Uniform Rule 54; California Evidence Code § 1155; Kansas Code of Civil Procedure § 60–454; New Jersey Evidence Rule 54.

Rule 412. Rape Cases; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

(Added Pub.L. 95–540, § 2(a), Oct. 28, 1978, 92 Stat. 2046.)

CONGRESSIONAL DISCUSSION.

The following discussion in the House of Representatives on October 10, 1978, preceded passage of H.R. 4727, which enacted Rule 412. The discussion appears in 124 Cong. Record, at page H. 11944.

Mr. MANN. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, for many years in this country, evidentiary rules have permitted the introduction of evidence about a rape victim's prior sexual conduct. Defense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life. Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life.

The evidentiary rules that permit such inquiry have in recent years come under question; and the States have taken the lead to change and modernize their evidentiary rules about evidence of a rape victim's prior sexual behavior. The bill before us similarly seeks to modernize the Federal evidentiary rules.

The present Federal Rules of Evidence reflect the traditional approach. If a defendant in a rape case raises the defense of consent, that defendant may then offer evidence about the victim's prior sexual behavior. Such evidence may be in the form of opinion evidence, evidence of reputation, or evidence of specific instances of behavior. Rule 404(a)(2) of the Federal Rules of Evidence permits the introduction of evidence of a "pertinent character trait." The advisory committee note to that rule cites, as an example of what the rule covers, the character of a rape victim when the issue is consent. Rule 405 of the Federal Rules of Evidence permits the use of opinion or reputation evidence or the use of evidence of specific behavior to show a character trait.

Thus, Federal evidentiary rules permit a wide ranging inquiry into the private conduct of a rape victim, even though that conduct may have at best a tenuous connection to the offense for which the defendant is being tried.

H.R. 4727 amends the Federal Rules of Evidence to add a new rule, applicable only in criminal cases, to spell out when, and under what conditions, evidence of a rape victim's prior sexual behavior can be admitted. The new rule provides that reputation or opinion evidence about a rape victim's prior sexual behavior is not admissible. The new rule also provides that a court cannot admit evidence of specific instances of a rape victim's prior sexual conduct except in three circumstances.

The first circumstance is where the Constitution requires that the evidence be admitted. This exception is intended to cover those infrequent instances where, because of an unusual chain of circumstances, the general rule of inadmissibility, if followed, would result in denying the defendant a constitutional right.

The second circumstance in which the defendant can offer evidence of specific instances of a rape victim's prior sexual behavior is where the defendant raises the issue of consent and the evidence is of sexual behavior with the defendant. To admit such evidence, however, the court must find that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice.

The third circumstance in which a court can admit evidence of specific instances of a rape victim's prior sexual behavior is where the evidence is of behavior with someone other than the defendant and is offered by the defendant on the issue of whether or not he was the source of semen or injury. Again, such evidence will be admitted only if the court finds that the evidence is relevant and that its probative value outweighs the danger of unfair prejudice.

The new rule further provides that before evidence is admitted under any of these exceptions, there must be an in camera hearing—that is, a proceeding that takes place in the judge's chambers out of the presence of the jury and the general public. At this hearing, the defendant will present the evidence he intends to offer and be able to argue why it should be admitted. The prosecution, of course, will be able to argue against that evidence being admitted.

The purpose of the in camera hearing is twofold. It gives the defendant an opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury. At the same time, it protects the privacy of the rape victim in those instances when the court finds that evidence is inadmissible. Of course, if the court finds the evidence to be admissible, the evidence will be presented to the jury in open court.

The effect of this legislation, therefore, is to preclude the routine use of evidence of specific instances of a rape victim's prior sexual behavior. Such evidence will be admitted only in clearly and narrowly defined circumstances and only after an in camera hearing. In determining the admissibility of such evidence, the court will consider all of the facts and circumstances surrounding the evidence, such as the amount of time that lapsed between the alleged prior act and the rape charged in the prosecution. The greater the lapse of time, of course, the less likely it is that such evidence will be admitted.

Mr. Speaker, the principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives. It does so by narrowly circumscribing when such evidence may be admitted. It does not do so, however, by sacrificing any constitutional right possessed by the defendant. The bill before us fairly balances the interests involved—the rape victim's interest in protecting her private life from unwarranted public exposure; the defendant's interest in being able adequately to present a defense by offering relevant and probative evidence; and society's interest in a fair trial, one where unduly prejudicial evidence is not permitted to becloud the issues before the jury.

I urge support of the bill.

Mr. WIGGINS. Mr. Speaker, I yield myself such time as I may consume.

(Mr. WIGGINS asked and was given permission to revise and extend his remarks.)

Mr. WIGGINS. Mr. Speaker, this legislation addresses itself to a subject that is certainly a proper one for our consideration. Many of us have been troubled for years about the indiscriminate and prejudicial use of testimony with respect to a victim's prior sexual behavior in rape and similar cases. This bill deals with that problem. It is not, in my opinion, Mr. Speaker, a perfect bill in the manner in which it deals with the problem, but my objections are not so fundamental as would lead me to oppose the bill.

I think, Mr. Speaker, that it is unwise to adopt a per se rule absolutely excluding evidence of reputation and opinion with respect to the victim—and this bill does that—but it is difficult for me to foresee the specific case in which such evidence might be admissible. The trouble is this, Mr. Speaker: None of us can foresee perfectly all of the various circumstances under which the propriety of evidence might be before the court. If this bill has a defect, in my view it is because it adopts a per se rule with respect to opinion and reputation evidence.

Alternatively we might have permitted that evidence to be considered in camera as we do other evidence under the bill.

I should note, however, in fairness, having expressed minor reservations, that the bill before the House at this time does improve significantly upon the bill which was presented to our committee.

I will not detail all of those improvements but simply observe that the bill upon which we shall soon vote is a superior product to that which was initially considered by our subcommittee.

Mr. Speaker, I ask my colleagues to vote for this legislation as being, on balance, worthy of their support, and urge its adoption.

I reserve the balance of my time.

Mr. MANN. Mr. Speaker, this legislation has more than 100 cosponsors, but its principal sponsor, as well as its architect is the gentlewoman from New York (Ms. Holtzman). As the drafter of the legislation she will be able to provide additional information about the probable scope and effect of the legislation.

I yield such time as she may consume to the gentlewoman from New York (Ms. Holtzman).

(Ms. HOLTZMAN asked and was given permission to revise and extend her remarks.)

Ms. HOLTZMAN. Mr. Speaker, I would like to begin first by complimenting the distinguished gentleman from South Carolina (Mr. Mann), the chairman of the subcommittee, for his understanding of the need for corrective legislation in this area and for the fairness with which he has conducted the subcommittee hearings. I would like also to compliment the other members of the subcommittee, including the gentleman from California (Mr. Wiggins).

Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported

crime. It is estimated that as few as one in ten rapes is ever reported.

Mr. Speaker, over 30 States have taken some action to limit the vulnerability of rape victims to such humiliating cross-examination of their past sexual experiences and intimate personal histories. In federal courts, however, it is permissible still to subject rape victims to brutal cross-examination about their past sexual histories. H.R. 4727 would rectify this problem in Federal courts and I hope, also serve as a model to suggest to the remaining states that reform of existing rape laws is important to the equity of our criminal justice system.

H.R. 4727 applies only to criminal rape cases in Federal courts. The bill provides that neither the prosecution nor the defense can introduce any reputation or opinion evidence about the victim's past sexual conduct. It does permit, however, the introduction of specific evidence about the victim's past sexual conduct in three very limited circumstances.

First, this evidence can be introduced if it deals with the victim's past sexual relations with the defendant and is relevant to the issue of whether she consented. Second, when the defendant claims he had no relations with the victim, he can use evidence of the victim's past sexual relations with others if the evidence rebuts the victim's claim that the rape caused certain physical consequences, such as semen or injury. Finally, the evidence can be introduced if it is constitutionally required. This last exception, added in subcommittee, will insure that the defendant's constitutional rights are protected.

Before any such evidence can be introduced, however, the court must determine at a hearing in chambers that the evidence falls within one of the exceptions.

Furthermore, unless constitutionally required, the evidence of specific instances of prior sexual conduct cannot be introduced at all if it would be more prejudicial and inflammatory than probative.

Mr. Speaker, I urge adoption of this bill. It will protect women from both injustice and indignity.

Mr. MANN. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. WIGGINS. Mr. Speaker, I have no further requests for time, and yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from South Carolina (Mr. Mann) that the House suspend the rules and pass the bill H.R. 4727, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

ARTICLE V. PRIVILEGES

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific nonconstitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the Courts of the United States in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added by the Committee to the lone term "witness" used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after Rule 302 and similar to language added by the Committee to Rule 601 relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), a result in accord with current federal court decisions. See *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 555–556 n.2 (2nd Cir. 1967). The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court [proposed] Rule 501) that this result is not mandated under *Erie*.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive

areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense removes the incentive to "shop".

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal courts must recognize (i.e., required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. As noted supra, the House amended article V to eliminate all of the Court's specific rules on privileges. Through a single rule, 501, the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience (a standard derived from rule 26 of the Federal Rules of Criminal Procedure) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision, in which event state privilege law was to govern.

The committee agrees with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case. The committee understands that thrust of the House amendment to require that State privilege law be applied in "diversity" cases (actions on questions of State law between citizens of different States arising under 28 U.S.C. § 1332). The language of the House amendment, however, goes beyond this in some respects, and falls short of it in others: State privilege law applies even in nondiversity. Federal question civil cases, where an issue governed by State substantive law is the object of the evidence (such issues do sometimes arise in such cases); and, in all instances where State privilege law is to be applied, e.g., on proof of a State issue in a diversity case, a close reading reveals that State privilege law is not to be applied unless the matter to be proved is an element of that State claim or defense, as distinguished from a step along the way in the proof of it.

The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that "in civil actions * * * with respect to an element of a claim or defense as to which State law supplies the rule of decision," State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law. [For a discussion of reference to State substantive law, see note on Federal Incorporation by Reference of State Law, Hart & Wechsler, The Federal Courts and the Federal System, pp. 491–494 (2d ed. 1973).] Is a claim (or defense) based on such a reference a claim or defense as to which federal or State law supplies the rule of decision?

Another problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a federal case containing a combination of Federal and State claims and defenses, e.g. an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other. [The problems with the House formulation are discussed in Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Georgetown University Law Journal 125 (1973) at notes 25, 26 and 70–74 and accompanying text.]

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. [It is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.] Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise.) [While such a situation might require use of two bodies of privilege law, federal and state, in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based on the present rule 43(a) of the Federal Rules of Civil Procedure which provides:

In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein

made.] It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under 28 U.S.C. § 1441(b).

Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Further, we would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule and not by rule 601 of the competency of witnesses.

NOTES OF THE CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, Federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.
D'Oench, Duhme & Co. v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See C. A. Wright, Federal Courts 251-252 (2d ed. 1970); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *DeSylva* v. *Ballentine*, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedure § 2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501.

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo.Wash.L.Rev. 53 (1965). Discretion is regular-

ly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on voir dire examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision. Cf. *Courtland* v. *Walston & Co., Inc.*, 340 F.Supp. 1076, 1087–1092 (S.D.N.Y.1972).

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

The amendment to rule 601 parallels the treatment accorded rule 501 discussed immediately above.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

"* * * [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick § 10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore § 650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

The reference to Rule 703 is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, 1 U.S.C. § 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. §§ 459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. § 1621.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule implements Rule 43(f) of the Federal Rules of Civil Procedure and Rule 28(b) of the Federal Rules of Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

In view of the mandate of 28 U.S.C. § 455 that a judge disqualify himself in "any case in which he * * * is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot. 157 A.L.R. 311; McCormick § 68, p. 147; Uniform Rule 42; California Evidence Code § 703; Kansas Code of Civil Procedure § 60–442; New Jersey Evidence Rule 42. Cf. 6 Wigmore § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311.

The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

Rule 606. Competency of Juror as Witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

(As amended Pub.L. 94–149, § 1(10), Dec. 12, 1975, 89 Stat. 805.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605.

Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald* v. *Pless*, 238 U.S. 264, 35 S.Ct. 785, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only

promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz* v. *Werre*, 129 N.W.2d 681 (N.D.1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2340 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox* v. *United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde* v. *United States*, 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald* v. *Pless*, 238 U.S. 264 (1915); speculation as to insurance coverage, *Holden* v. *Porter*, 495 F.2d 878 (10th Cir. 1969), *Farmers Coop. Elev. Ass'n* v. *Strand*, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied 389 U.S. 1014; misinterpretations of instructions, *Farmers Coop. Elev. Ass'n* v. *Strand, supra;* mistake in returning verdict, *United States* v. *Chereton*, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, *United States* v. *Crosby*, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox* v. *United States*, 146 U.S. 140 (1892). See also *Parker* v. *Gladden*, 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

See also Rule 6(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500, governing the secrecy of grand jury proceedings. The present rule does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that "* * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that—

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodies long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened

during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In *McDonald* v. *Pless*, the Court stated:

* * * * * *

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference [238 U.S. 264, at 267 (1914)].

* * * * * *

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.

1975 AMENDMENTS

Subd. (b). Pub.L. 94-149 substituted in last sentence "which" for "what".

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). Ladd, Impeachment of One's Own Witness—New Developments, 4 U.Chi.L.Rev. 69 (1936); McCormick § 38; 3 Wigmore §§ 896-918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 Wigmore § 905. Revised Rule 32(a)(1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of his deposition, and Rule 43(b) has allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill.Rev.Stats.1967, c. 110, § 60; Mass.Laws Annot. 1959, c. 233 § 23; 20 N.M.Stats. Annot. 1953, § 20-2-4; N.Y. CPLR § 4514 (McKinney 1963); 12 Vt.Stats. Annot. 1959, §§ 1641a, 1642. Complete judicial rejection of the old rule is found in *United States* v. *Freeman*, 302 F.2d 347 (2d Cir. 1962). The same result is reached in Uniform Rule 20; California Evidence Code § 785; Kansas Code of Civil Procedure § 60-420. See also New Jersey Evidence Rule 20.

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or un-

truthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick § 44.

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a). While the modern practice has purported to exclude opinion, witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. See McCormick § 44. And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath. *United States* v. *Walker*, 313 F.2d 236 (6th Cir. 1963), and cases cited therein; McCormick § 44, pp. 94–95, n. 3.

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965); McCormick § 49, p. 105; 4 Wigmore § 1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick § 49; 4 Wigmore §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances. McCormick § 49. Cf. 4 Wigmore §§ 1108, 1109.

As to the use of specific instances on direct by an opinion witness, see the Advisory Committee's Note to Rule 405, *supra*.

Subdivision (b). In conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 609, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

The final sentence constitutes a rejection of the doctrine of such cases as *People* v. *Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See *Ferguson* v. *Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); McCormick § 131; 8 Wigmore § 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 608(a) as submitted by the Court permitted attack to be made upon the character for truthfulness or untruthfulness of a witness either by reputation or opinion testimony. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), the Committee amended Rule 608(a) to delete the reference to opinion testimony.

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a

witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, "and not remote in time". Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of "his" in the original Court proposal.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

The Senate amendment adds the words "opinion or" to conform the first sentence of the rule with the remainder of the rule.

The Conference adopts the Senate amendment.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure; Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck* v. *United States*, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation.

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and

resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, 18 U.S.C. § 13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. § 1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. § 1865, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests—Current Trends, 89 U.Pa.L.Rev. 166, 176–177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing in Evidence Code, § 788(5), p. 142, Cal.Law Rev.Comm'n (1965), though not adopted. See California Evidence Code § 788.

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in California Evidence Code § 788. Cf. A.L.I. Model Penal Code, Proposed Official Draft § 306.6(3)(e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction *ab initio*.

Subdivision (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. *Thomas* v. *United States*, 74 App.D.C. 167, 121 F.2d 905 (1941); *Cotton* v. *United States*, 355 F.2d 480 (10th Cir. 1966). This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of *parens patriae*, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While *Gault* was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 U.S. at 25, 87 S.Ct. 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum.L.Rev. 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore § 196; 3 *Id.* §§ 924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. *United States* v. *Empire Packing Co.*, 174 F.2d 16 (7th Cir. 1949), cert. denied 337 U.S. 959, 69 S.Ct. 1534, 93 L.Ed. 1758; *Bloch* v. *United States*, 226 F.2d 185 (9th Cir. 1955), cert. denied 350 U.S. 948, 76 S.Ct. 323, 100 L.Ed. 826 and 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910; and see *Newman* v. *United States*, 331 F.2d 968 (8th Cir. 1964), *Contra, Campbell* v. *United States*, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of

prior conviction should be limited to those kinds of convictions bearing directly on credibility, *i.e.*, crimes involving dishonesty or false statement.

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a)), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year", on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure," but also to "pardon" and "annulment."

NOTES OF COMMITTEE OF THE JUDICIARY, SENATE REPORT NO. 93-1277

As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantial-

ly outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant.* The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. *Tucker* v. *Reil,* 51 Ariz. 357, 77 P.2d 203 (1938). To the same effect, though less specifically worded, is California Evidence Code § 789. See 3 Wigmore § 936.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be

permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In *Alford* v. *United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule.

Subdivision (b). The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, 129 F. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions. This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. *Finch* v. *Weiner*, 109 Conn. 616, 145 A. 31 (1929). While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at the appellate level is likely to prove fruitful. See for example, *Moyer* v. *Aetna Life Ins. Co.*, 126 F.2d 141 (3rd Cir. 1942); *Butler* v. *New York Central R. Co.*, 253 F.2d 281 (7th Cir. 1958); *United States* v. *Johnson*, 285 F.2d 35 (9th Cir. 1960); *Union Automobile Indemnity Ass'n.* v. *Capitol Indemnity Ins. Co.*, 310 F.2d 318 (7th Cir. 1962). In evaluating these considerations, McCormick says:

"The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many court rooms, of continual bickering over the choice of the numerous variations of the 'scope of the direct' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisions were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937–38 said this:

" 'The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

"We recommend that the rule allowing questions upon any part of the issue known to the witness * * * be adopted. * * *' " McCormick, § 27, p. 51. See also 5 Moore's Federal Practice ¶ 43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the trial. Under *Simmons* v. *United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), no general

waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 104(d), *supra*. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in *Tucker* v. *United States*, 5 F.2d 818 (8th Cir. 1925), is inconsistent with the description of the waiver as extending to "all other relevant facts" in *Johnson* v. *United States*, 318 U.S. 189, 195, 63 S.Ct. 549, 87 L.Ed. 704 (1943). See also *Brown* v. *United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958). The situation of an accused who desires to testify on some but not all counts of a multiple-count indictment is one to be approached, in the first instance at least, as a problem of severance under Rule 14 of the Federal Rules of Criminal Procedure. *Cross* v. *United States*, 118 U.S.App.D.C. 324, 335 F.2d 987 (1964). Cf. *United States* v. *Baker*, 262 F.Supp. 657, 686 (D.D.C. 1966). In all events, the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination.

Subdivision (c). The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774–778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has included only "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, *Maryland Casualty Co.* v. *Kador*, 225 F.2d 120 (5th Cir. 1955), and *Degelos* v. *Fidelity and Casualty Co.*, 313 F.2d 809 (5th Cir. 1963), holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, "witness identified with" an adverse party, is designed to enlarge the category of persons thus callable.

NOTES OF COMMITTEE OF THE JUDICIARY, HOUSE REPORT NO. 93–650

As submitted by the Court, Rule 611(b) provided:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The Committee amended this provision to return to the rule which prevails in the federal courts and thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The third sentence of Rule 611(c) as submitted by the Court provided that:

> In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

The Committee amended this Rule to permit leading questions to be used with respect to any hostile witness, not only an adverse party or person identified with such adverse party. The Committee also substituted the word "When" for the phrase "In civil cases" to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the Committee believed the defendant should be permitted to inquire with leading questions.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Rule 611(b) as submitted by the Supreme Court permitted a broad scope of cross-examination: "cross-examination on any matter relevant to any issue in the case" unless the judge, in the interests of justice, limited the scope of cross-examination.

The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.

The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from perspectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discretion is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

The House amendment providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination. As a general rule, we concur with this limitation, however, we would under-

stand that this limitation would not preclude the utilization of leading questions if the conditions of subsection (c) of this rule were met, bearing in mind the judge's discretion in any case to limit the scope of cross-examination [see McCormick on Evidence, §§ 24–26 (especially 24) (2d ed. 1972)].

Further, the committee has received correspondence from Federal judges commenting on the applicability of this rule to section 1407 of title 28. It is the committee's judgment that this rule as reported by the House is flexible enough to provide sufficiently broad cross-examination in appropriate situations in multidistrict litigation.

As submitted by the Supreme Court, the rule provided: "In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

The final sentence of subsection (c) was amended by the House for the purpose of clarifying the fact that a "hostile witness"—that is a witness who is hostile in fact—could be subject to interrogation by leading questions. The rule as submitted by the Supreme Court declared certain witnesses hostile as a matter of law and thus subject to interrogation by leading questions without any showing of hostility in fact. These were adverse parties or witnesses identified with adverse parties. However, the wording of the first sentence of subsection (c) while generally, prohibiting the use of leading questions on direct examination, also provides "except as may be necessary to develop his testimony." Further, the first paragraph of the Advisory Committee note explaining the subsection makes clear that they intended that leading questions could be asked of a hostile witness or a witness who was unwilling or biased and even though that witness was not associated with an adverse party. Thus, we question whether the House amendment was necessary.

However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

The final sentence of this subsection was also amended by the House to cover criminal as well as civil cases. The committee accepts this amendment, but notes that it may be difficult in criminal cases to determine when a witness is "identified with an adverse party," and thus the rule should be applied with caution.

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. *Goldman* v. *United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); *Needelman* v. *United States*, 261 F.2d 802 (5th Cir. 1958), cert. dismissed 362 U.S. 600, 80 S.Ct. 960, 4 L.Ed.2d 980, rehearing denied 363 U.S. 858, 80 S.Ct. 1606, 4 L.Ed.2d 1739, Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, *People* v. *Scott*, 29 Ill.2d 97, 193 N.E.2d 814 (1963); *State* v. *Mucci*, 25 N.J. 423, 136 A.2d 761 (1957); *State* v. *Hunt*, 25 N.J. 514, 138 A.2d 1 (1958); *State* v. *Desolvers*, 40 R.I. 89, 100 A. 64 (1917), and this position is believed to be correct. As Wigmore put it, "the risk of imposition and the need of safeguard is just as great" in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17.

The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

The purpose of the rule is the same as that of the *Jencks* statute, 18 U.S.C. § 3500: to promote the search of credibility and memory. The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute, subdivision (a) of which provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of a subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Items falling within the purview of the statute are producible only as provided by its terms, *Palermo* v. *United States*, 360 U.S. 343, 351 (1959), and disclosure under the rule is limited similarly by the statutory conditions. With this limitation

in mind, some differences of application may be noted. The *Jencks* statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures makes this of no importance.

The consequences of nonproduction by the government in a criminal case are those of the *Jencks* statute, striking the testimony or in exceptional cases a mistrial. 18 U.S.C. § 3500(d). In other cases these alternatives are unduly limited, and such possibilities as contempt, dismissal, finding issues against the offender, and the like are available. See Rule 16(g) of the Federal Rules of Criminal Procedure and Rule 37(b) of the Federal Rules of Civil Procedure for appropriate sanctions.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

As submitted to Congress, Rule 612 provided that except as set forth in 18 U.S.C. 3500, if a witness uses a writing to refresh his memory for the purpose of testifying, "either before or while testifying," an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness' testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See *Goldman v. United States*, 316 U.S. 129 (1942). The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.

The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The Queen's Case, 2 Br. & B. 284, 129 Eng.Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 246–247 (1967); McCormick § 28; 4 Wigmore §§ 1259–1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b). The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. See Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 247 (1967). The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. See Comment to California Evidence Code § 770. Also, dangers of oversight are reduced.

See McCormick § 37, p. 68.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge. Similar provisions are found in California Evidence Code § 770 and New Jersey Evidence Rule 22(b).

Under principles of *expression unius* the rule does not apply to impeachment by evidence of prior inconsistent conduct. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. McCormick § 8, p. 14; Maguire, Weinstein, et al., Cases on Evidence 303–304 (5th ed. 1965); 9 Wigmore § 2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 607, *supra*. Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

Subdivision (b). The authority of the judge to question witnesses is also well established. McCormick § 8, pp. 12–13; Maguire, Weinstein, et al., Cases on Evidence 737–739 (5th ed. 1965); 3 Wigmore § 784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

Subdivision (c). The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness.

Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837–1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *United States* v. *Infanzon*, 235 F.2d 318 (2d Cir. 1956); *Portomene* v. *United States*, 221 F.2d 582 (5th Cir. 1955); *Powell* v. *United States*, 208 F.2d 618 (6th Cir. 1953); *Jones* v. *United States*, 252 F.Supp. 781 (W.D.Okl. 1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code § 777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in—he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are California Evidence Code § 800; Kansas Code of Civil Procedure § 60–456(a); New Jersey Evidence Rule 56(1).

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible

sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co.* v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963) See also Blum et al, The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, 24 U.Chi.L.Rev. 1 (1956); Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, 48 A.B.A.J. 329 (1962); Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev. Comm'n, Recommendation Proposing an Evidence Code 148–150 (1965).

Rule 704. Opinion on ultimate issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

(As amended Pub.L. 98–473, Title IV, § 406, Oct. 12, 1984, 98 Stat. 2067.)

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The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. *People* v. *Wilson*, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co.* v. *Industrial Comm.*, 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; *Dowling* v. *L. H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; *Schweiger* v. *Solbeck*, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately ex-

plored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

For similar provisions see Uniform Rule 56(4); California Evidence Code § 805; Kansas Code of Civil Procedures § 60–456(d); New Jersey Evidence Rule 56(3).

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at second-hand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in the Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data * * *."

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60–456, 60–457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

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The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility

that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott* v. *Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962); *Danville Tobacco Assn.* v. *Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S.Cal.L.Rev. 195 (1956); 2 Wigmore § 563, 9 *Id.* § 2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 322 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§ 730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, § 215(d); Burns Indiana Stats. 1956, § 9–1702; Wisconsin Stats.Annot.1958, § 957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§ 730–731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subdivision (d) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

ARTICLE VIII. HEARSAY

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INTRODUCTORY NOTE: THE HEARSAY PROBLEM

The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177 (1948), Selected Writings on Evidence and Trial 764, 765 (Fryer ed. 1957); Shientag, Cross-Examination—A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 485 (1937), Selected Writings, *supra*, 756, 757: Weinstein, Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

(2) The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 495–496, 71 S.Ct. 456, 95 L.Ed. 456 (1951); Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 A.B.A.J. 580 (1961), quoting numerous authorities. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom directed. Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

(3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth," but all will agree with his statement that it has become a "vital feature" of the Anglo-American system. 5 Wigmore § 1367, p. 29. The

belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942).

The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.

(1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the declarant were available, compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement. This is the tenor of Uniform Rule 63(1), admitting the hearsay declaration of a person "who is present at the hearing and available for cross-examination." Compare the treatment of declarations of available declarants in Rule 801(d)(1) of the instant rules. If the declarant were unavailable, a rule of free admissibility would make no distinctions in terms of degrees of noncompliance with the ideal conditions and would exact no liquid pro quo in the form of assurances of trustworthiness. Rule 503 of the Model Code did exactly that, providing for the admissibility of any hearsay declaration by an unavailable declarant, finding support in the Massachusetts act of 1898, enacted at the instance of Thayer, Mass.Gen.L.1932, c. 233 § 65, and in the English act of 1938, St.1938, c. 28, Evidence. Both are limited to civil cases. The draftsmen of the Uniform Rules chose a less advanced and more conventional position. Comment, Uniform Rule 63. The present Advisory Committee has been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant.

In criminal cases, the Sixth Amendment requirement of confrontation would no doubt move into a large part of the area presently occupied by the hearsay rule in the event of the abolition of the latter. The resultant split between civil and criminal evidence is regarded as an undesirable development.

(2) Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Weinstein, The Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn.L.Rev. 506 (1934). Procedural safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases. The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in determining credibility. For a judge to exclude evidence because he does not believe it has been described as "altogether atypical, extraordinary. * * *" Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L.Rev. 932, 947 (1962).

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable circumstantial guarantees of trustworthiness." Rules 803(24) and 804(b)(6). This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

CONFRONTATION AND DUE PROCESS

Until very recently, decisions invoking the confrontation clause of the Sixth Amendment were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the states and by the hearsay rule's occupancy of much the same ground. The pattern which emerges from the earlier cases invoking the clause is substantially that of the hearsay rule, applied to criminal cases: an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-examination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimo-

ny of unavailable witnesses. *Mattox* v. *United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Motes* v. *United States*, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900); *Delaney* v. *United States*, 263 U.S. 586, 44 S.Ct. 206, 68 L.Ed. 462 (1924). Beginning with *Snyder* v. *Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal. The language of *Snyder* was that of an elastic concept of hearsay. The deportation case of *Bridges* v. *Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), may be read broadly as imposing a strictly construed right of confrontation in all kinds of cases or narrowly as the product of a failure of the Immigration and Naturalization Service to follow its own rules. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), ruled that cross-examination was essential to due process in a state contempt proceeding, but in *United States* v. *Nugent*, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417 (1953), the court held that it was not an essential aspect of a "hearing" for a conscientious objector under the Selective Service Act. *Stein* v. *New York*, 346 U.S. 156, 196, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953), disclaimed any purpose to read the hearsay rule into the Fourteenth Amendment, but in *Greene* v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), revocation of security clearance without confrontation and cross-examination was held unauthorized, and a similar result was reached in *Willner* v. *Committee on Character*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). Ascertaining the constitutional dimensions of the confrontation-hearsay aggregate against the background of these cases is a matter of some difficulty, yet the general pattern is at least not inconsistent with that of the hearsay rule.

In 1965 the confrontation clause was held applicable to the states. *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Prosecution use of former testimony given at a preliminary hearing where petitioner was not represented by counsel was a violation of the clause. The same result would have followed under conventional hearsay doctrine read in the light of a constitutional right to counsel, and nothing in the opinion suggests any difference in essential outline between the hearsay rule and the right of confrontation. In the companion case of *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), however, the result reached by applying the confrontation clause is one reached less readily via the hearsay rule. A confession implicating petitioner was put before the jury by reading it to the witness in portions and asking if he made that statement. The witness refused to answer on grounds of self-incrimination. The result, said the Court, was to deny cross-examination, and hence confrontation. True, it could broadly be said that the confession was a hearsay statement which for all practical purposes was put in evidence. Yet a more easily accepted explanation of the opinion is that its real thrust was in the direction of curbing undesirable prosecutorial behavior, rather than merely applying rules of exclusion, and that the confrontation clause was the means selected to achieve this end. Comparable facts and a like result appeared in *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

The pattern suggested in *Douglas* was developed further and more distinctly in a pair of cases at the end of the 1966 term. *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert* v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), hinged upon practices followed in identifying accused persons before trial. This pretrial identification was said to be so decisive an aspect of the case that accused was entitled to have counsel present; a pretrial identification made in the absence of counsel was not itself receivable in evidence and, in addition, might fatally infect a courtroom identification. The presence of counsel at the earlier identification was described as a necessary prerequisite for "a meaningful confrontation at trial." *United States* v. *Wade*, *supra*, 388 U.S. at p. 236, 87 S.Ct. at p. 1937. *Wade* involved no evidence of the fact of a prior identification and hence was not susceptible of being decided on hearsay grounds. In *Gilbert*, witnesses did testify to an earlier identification, readily classificable as hearsay under a fairly strict view of what constitutes hearsay. The Court, however, carefully avoided basing the decision on the hearsay ground, choosing confrontation instead. 388 U.S. 263, 272, n. 3, 87 S.Ct. 1951. See also *Parker* v. *Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), holding that the right of confrontation was violated when the bailiff made prejudicial statements to jurors, and Note, 75 Yale L.J. 1434 (1966).

Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility. See Uniform Rule 63(1) to (31) and California Evidence Code §§ 1200–1340.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject

to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(As amended Pub.L. 94–113, § 1, Oct. 16, 1975, 89 Stat. 576.)

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Subdivision (a). The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan.L.Rev. 682 (1962). Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, 33 Rocky Mt.L. Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand.L.Rev. 741, 765–767 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code §§ 225, 1200; Kansas Code of Civil Procedure § 60–459(a); New Jersey Evidence Rule 62(1).

Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 *Id.* § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp.* v. *General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534, letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

Subdivision (d). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) *Prior statement by witness.* Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when

the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges* v. *Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath. Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. *State* v. *Saporen*, 205 Minn. 358, 285 N.W. 898 (1939); *Ruhala* v. *Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *People* v. *Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). In respect to demeanor, as Judge Learned Hand observed in *Di Carlo* v. *United States*, 6 F.2d 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in *People* v. *Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in *California* v. *Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

(C) The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. Illustrative are *People* v. *Gould*, 54 Cal.2d 621, 7 Cal.Rptr. 273, 354 P.2d 865 (1960); *Judy* v. *State*, 218 Md. 168, 146 A.2d 29 (1958); *State* v. *Simmons*, 63 Wash.2d 17, 385 P.2d 389 (1963); California Evidence Code § 1238; New Jersey Evidence Rule 63(1)(c); N.Y. Code of Criminal Procedure § 393-b. Further cases are found in 4 Wigmore § 1130. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in *Gilbert* v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the Court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification ("That's the man") violated either the hearsay rule or the right of confrontation because not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the Court observed:

"There is a split among the States concerning the admissibility of prior extra-judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification

under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 ALR2d Later Case Service 1225–1228. " " "" 388 U.S. at 272, n. 3, 87 S.Ct. at 1956.

(2) *Admissions.* Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent affairs. To the same effect in California Evidence Code § 1220. Compare Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159–161. In accord is New Jersey Evidence Rule 63(8)(a). Cf. Uniform Rule 63(8)(a) and California Evidence Code § 1222 which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand.L. Rev. 855, 860–861 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines* v. *Tuller*, 110 U.S.App.D.C. 282, 292 F.2d 775, 784 (1961); *Martin* v. *Savage Truck Lines, Inc.*, 121 F.Supp. 417 (D.D.C. 1054), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., pp. 66–73, with comments by the editor that the statements should have been excluded as not within scope of agency. For the traditional view see *Northern Oil Co.* v. *Socony Mobile Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9)(a), Kansas Code of Civil Procedure § 60–460(i)(1), and New Jersey Evidence Rule 63(9)(a).

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954); Comment, 25 U.Chi.L.Rev. 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch* v. *United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *Wong Sun* v. *United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). For similarly limited provisions see California Evidence Code § 1223 and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).

NOTES OF COMMITTEE ON THE JUDICIARY. HOUSE REPORT NO. 93–650

Present federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness

for impeachment only. Rule 801(d)(1) as proposed by the Court would have permitted all such statements to be admissible as substantive evidence, an approach followed by a small but growing number of State jurisdictions and recently held constitutional in *California* v. *Green*, 399 U.S. 149 (1970). Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation in criminal cases, the Committee decided to adopt a compromise version of the Rule similar to the position of the Second Circuit. The Rule as amended draws a distinction between types of prior inconsistent statements (other than statements of identification of a person made after perceiving him which are currently admissible, see *United States* v. *Anderson*, 406 F.2d 719, 720 (4th Cir.), cert. denied, 395 U.S. 967 (1969)) and allows only those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth. Compare *United States* v. *DeSisto*, 329 F.2d 929 (2nd Cir.), cert. denied, 377 U.S. 979 (1964); *United States* v. *Cunningham*, 446 F.2d 194 (2nd Cir. 1971) (restricting the admissibility of prior inconsistent statements as substantive evidence to those made under oath in a formal proceeding, but not requiring that there have been an opportunity for cross-examination). The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

As submitted by the Supreme Court, subdivision (d)(1)(A) made admissible as substantive evidence the prior statement of a witness inconsistent with his present testimony.

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary since this rule comes into play only when the witness testifies in the present trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court [*Di Carlo* v. *U.S.*, 6 F.2d 364 (2d Cir. 1925)].

The rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand [see Comment, California Evidence Code § 1235; McCormick, Evidence, § 38 (2nd ed. 1972)].

New Jersey, California, and Utah have adopted a rule similar to this one; and Nevada, New Mexico, and Wisconsin have adopted the identical Federal rule.

For all of these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated. [It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate].

As submitted by the Supreme Court and as passed by the House, subdivision (d)(1)(c) of rule 801 made admissible the prior statement identifying a person made after perceiving him. The committee decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision.

The House approved the long-accepted rule that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. *United States* v. *Rinaldi*, 393 F.2d 97, 99 (2d Cir.), cert. denied 393 U.S. 913 (1968); *United States* v. *Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969).

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 801 supplies some basic definitions for the rules of evidence that deal with hearsay. Rule 801(d)(1) defines certain statements as not hearsay. The Senate amendments make two changes in it.

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and if the statement is inconsistent with his testimony and was given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition. The Senate amendment drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.

The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

The Conference adopts the Senate amendment.

1975 AMENDMENT

Subd. (d)(1). Pub.L. 94–113 added cl. (C).

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(g): proof of service by affidavit.

Rule 32: admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4(a): affidavits to show grounds for issuing warrants.

Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

ACTS OF CONGRESS

10 U.S.C. § 7730: affidavits of unavailable witnesses in actions for damages caused by vessel in naval service, or towage or salvage of same, when taking of testimony or bringing of action delayed or stayed on security grounds.

29 U.S.C. § 161(4): affidavit as proof of service in NLRB proceedings.

38 U.S.C. § 5206: affidavit as proof of posting notice of sale of unclaimed property by Veterans Administration.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, associa-

tion, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community,

arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(As amended Pub.L. 94-149, § 1(11), Dec. 12, 1975, 89 Stat. 805.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances.

See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340–341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum. L.Rev. 432 (1928), it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot., 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception [paragraph] (1) are far less numerous. Illustrative are *Tampa Elec. Co.* v. *Getrost*, 151 Fla. 558, 10 So.2d 83 (1942); *Houston Oxygen Co.* v. *Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942); and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the *time element*, Exception [paragraph] (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception [paragraph] (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L.Rev. 224, 243 (1961); McCormick § 272, p. 580.

Participation by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra;* McCormick, *supra;* 6 Wigmore § 1755; Annot., 78 A.L.R.2d 300.

Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co.* v. *Mosely,* 75 U.S. (8 Wall.), 397, 19 L.Ed. 437 (1869); *Wheeler* v. *United States,* 93 U.S.App.D.C. 159, 211 F.2d 19 (1953); cert. denied 347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140; *Wetherbee* v. *Safety Casualty Co.,* 219 F.2d 274 (5th Cir. 1955); *Lampe* v. *United States,* 97 U.S.App.D.C. 160, 229 F.2d 43 (1956). Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may he sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick § 272, p. 579. Illustrative are *Armour & Co.* v. *Industrial Commission,* 78 Colo. 569, 243 P. 546 (1926); *Young* v. *Stewart,* 191 N.C. 297, 131 S.E. 735 (1926). Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People* v. *Poland,* 22 Ill.2d 175, 174 N.E.2d 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett* v. *Howden,* 73 N.M. 307, 387 P.2d 874 (1963); *Beck* v. *Dye,* 200 Wash. 1, 92 P.2d 1113 (1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible *subject matter* of the statement is limited under Exception [paragraph] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception [paragraph] (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. See *Sanitary Grocery Co.* v. *Snead,* 67 App.D.C. 129, 90 F.2d 374 (1937), slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor for a couple of hours," and *Murphy Auto Parts Co., Inc.* v. *Ball,* 101 U.S.App.D.C. 416, 249 F.2d 508 (1957), upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L.Rev. 204, 206–209 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); California Evidence Code § 1240 (as to Exception (2) only); Kansas Code of Civil Procedure § 60–460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard* v. *United States,* 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933); Maguire, The Hillmon Case—Thirty-three Years After, 38 Harv.L.Rev. 709, 719–731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U.Chi.L.Rev. 394, 421–423 (1934). The rule of *Mutual Life Ins. Co.* v. *Hillmon,* 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577–578; Annot., 34 A.L.R.2d 588, 62 A.L.R.2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260.

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co.* v. *Industrial Commission,* 2 Ill.2d 590, 119 N.E.2d 224 (1954); McCormick § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States* v. *Kelly,* 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.

R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens* v. *State*, 67 Md. 307, 316, 10 A. 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p. 593; 3 Wigmore § 738, p. 76; *Jordan* v. *People*, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied 373 U.S. 944, 83 S.Ct. 1553, 10 L.Ed.2d 699; *Hall* v. *State*, 223 Md. 158, 162 A.2d 751 (1960); *State* v. *Bindhammer*, 44 N.J. 372, 209 A.2d 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code § 1237 and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg & Meridian R.R.* v. *O'Brien*, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); *Ahern* v. *Webb*, 268 F.2d 45 (10th Cir. 1959); and see *N.L.R.B.* v. *Hudson Pulp and Paper Corp.*, 273 F.2d 660, 665 (5th Cir. 1960); *N.L.R.B.* v. *Federal Dairy Co.*, 297 F.2d 487 (1st Cir. 1962). But cf. *United States* v. *Adams*, 385 F.2d 548 (2d Cir. 1967).

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun* v. *Brancatella*, 93 N.J.L. 222, 107 A. 279 (1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. 28 U.S.C. § 1732. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States* v. *Mortimer*, 118 F.2d 266 (2d Cir. 1941); *La Porte* v. *United States*, 300 F.2d 878 (9th Cir. 1962); McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella* v. *Fyfe*, 171 F.2d 419 (1st Cir. 1948); *Gordon* v. *Robinson*, 210 F.2d 192 (3d Cir. 1954); *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; *Yates* v. *Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf. *Hawkins* v. *Gorea Motor Express, Inc.*, 360 F.2d 933 (2d Cir. 1966). *Contra*, 5 Wigmore § 1530a, n. 1, pp. 391–392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge * * * to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record * * *." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, 28 U.S.C. § 1732, may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co.* v. *Taylor*, 79 U.S.App.D.C. 66, 147 F.2d 297 (1945); *Lyles* v. *United States*, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. denied 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; *England* v. *United States*, 174 F.2d 466 (5th Cir. 1949); *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692 (8th Cir. 1967). Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed* v. *Order of United Commercial Travelers*, 123 F.2d 252 (2d Cir. 1941); *Buckminster's Estate* v. *Commissioner of Internal Revenue*, 147 F.2d 331 (2d Cir. 1944); *Medina* v. *Erickson*, 226 F.2d 475 (9th Cir. 1955); *Thomas* v. *Hogan*, 308 F.2d 355 (4th Cir. 1962); *Glawe* v. *Rulon*, 284 F.2d 495 (8th Cir. 1960). In the state courts, the trend favors admissibility. *Borucki* v. *MacKenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1938); *Allen* v. *St. Louis Public Service Co.*, 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); *People* v. *Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940); *Weis* v. *Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947). In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman* v. *Palmer*, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, 46 Iowa L.Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates* v. *Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965), otherwise if offered by the opposite party, *Korte* v. *New York, N.H. & H.R. Co.*, 191 F.2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog* v. *United States*, 217 F.2d 706 (4th Cir. 1954), error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States* v. *Ware*, 247 F.2d 698 (7th Cir. 1957), error to admit narcotics agents' records of purchases. See also Exception [paragraph] (8), *infra*, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, *United States* v. *New York Foreign Trade Zone Operators*, 304 F.2d 792 (2d Cir. 1962); *Taylor* v. *Baltimore & O.R. Co.*, 344 F.2d 281 (2d Cir. 1965), since the report was oriented in a direction other than the litigation which ensued. Cf. *Matthews* v. *United States*, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory

results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos* v. *United States*, 82 U.S.App.D.C. 278, 163 F.2d 593 (1947), error to admit police records of convictions; *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148, error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, *supra*, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60–460(n); New Jersey Evidence Rule 63(14).

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating report to the less appropriate business record exception to the hearsay rule. *Kay* v. *United States*, 255 F.2d 476 (4th Cir. 1958). The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo* v. *McGrath*, 196 F.2d 120 (9th Cir. 1952), and see *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919). As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6), supra.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; *Howard* v. *Perrin*, 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374 (1906), General Land Office records; *Ballew* v. *United States*, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895), Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States* v. *Van Hook*, 284 F.2d 489 (7th Cir. 1960), remanded for resentencing 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach* v. *United States*, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County* v. *Kelley*, 150 F.2d 356 (8th Cir. 1945); Weather Bureau records of rainfall; *United States* v. *Meyer*, 113 F.2d 387 (7th Cir. 1940), cert. denied 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States* v. *Dumas*, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893), statement of account certified by Postmaster General in action against postmaster; *McCarty* v. *United States*, 185 F.2d 520 (5th Cir. 1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; Petition of W—, 164 F.Supp. 659 (E.D.Pa.1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin* v. *Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944), State Fire Marshal's report of cause of gas explosion; *Lomax Transp. Co.* v. *United States*, 183 F.2d 331 (9th Cir. 1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung* v. *Dulles*, 229 F.2d 244 (2d Cir. 1956), "Status Reports" offered to justify delay in processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148. Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 7 U.S.C. § 210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate

from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include; (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, *Franklin* v. *Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944): (4) possible motivation problems suggested by *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [paragraph] (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281.

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception [paragraph] (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions [paragraphs] (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception [paragraph] (7). For instances of federal statutes recognizing this method of proof, see 8 U.S.C. § 1284(b), proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and 42 U.S.C. § 405(c)(3), (4)(B), (4)(C), absence of HEW [Department of Health, Education, and Welfare] record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. *People* v. *Love*, 310 Ill. 558, 142 N.E. 204 (1923), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); California Evidence Code § 1284; Kansas Code of Civil Procedure § 60–460(c); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. 8 U.S.C. § 1360(d), certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception [paragraph] (6) would be applicable. However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily* v. *Grand Lodge*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See California Evidence Code § 1315 and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions [paragraphs] (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60–460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Se-

curity Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra.* The rule is substantially identical in coverage with California Evidence Code § 1312.

Exception (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647–1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an *Erie* nature under *Cities Service Oil Co.* v. *Dunlap,* 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60–460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is university conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County* v. *Commercial Union Assurance Co.,* 286 F.2d 388 (5th Cir. 1961), upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see *id.* 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see California Evidence Code § 1331.

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702–1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60–460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2–724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, *City of Dothan* v. *Hardy,* 237 Ala. 603, 188 So. 264 (1939); *Lewandowski* v. *Preferred Risk Mut. Ins. Co.,* 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967); Uniform Rule 63(31); Kansas Code of Civil Procedure § 60–460(cc), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross* v. *Gardner,* 365 F.2d 554 (6th Cir. 1966); *Sayers* v. *Gardner,* 380 F.2d 940 (6th Cir. 1967); *Colwell* v. *Gardner,* 386 F.2d 56 (6th Cir. 1967); *Glendenning* v. *Ribicoff,* 213 F.Supp. 301 (W.D.Mo. 1962); *Cook* v. *Celebrezze,* 217 F.Supp. 366 (W.D.Mo. 1963); *Sosna* v. *Celebrezze,* 234 F.Supp. 289 (E.D.Pa. 1964); and see *McDaniel* v. *Celebrezze,* 331 F.2d 426 (4th Cir. 1964). The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to

explain and assist in the application of the treatise if declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly* v. *Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg* v. *Ferguson*, 193 So.2d 648 (Fla.App. 1967), cert. denied Fla., 201 So.2d 556; *Darling* v. *Charleston Memorial Community Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Dabroe* v. *Rhodes Co.*, 64 Wash.2d 431, 392 P.2d 317 (1964).

In *Reilly* v. *Pinkus, supra*, the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe* v. *Rhodes Co., supra.* Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 6130(b) and 801(d)(1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception [paragraph] (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *Id.* § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People* v. *Reeves*, 360 Ill. 55, 195 N.E. 443 (1935); *State* v. *Axilrod*, 248 Minn. 204, 79 N.W.2d 677 (1956); Mass.Stat. 1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception [paragraph] (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id.*, and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception [paragraph] (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299, which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but

without means to evaluate it, as suggested by Judge Hinton, Note 27 Ill.L.Rev. 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co.* v. *Militello*, 104 Colo. 28, 88 P.2d 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in *New York & Cuba Mail S.S. Co.* v. *Continental Cas. Co.*, 117 F.2d 404, 411 (2d Cir. 1941); *Connecticut Fire Ins. Co.* v. *Farrara*, 277 F.2d 388 (8th Cir. 1960).

Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. *Cope* v. *Goble*, 39 Cal.App.2d 448, 103 P.2d 598 (1940); *Jones* v. *Talbot*, 87 Idaho 498, 394 P.2d 316 (1964); *Warren* v. *Marsh*, 215 Minn. 615, 11 N.W.2d 528 (1943); Annot., 18 A.L.R.2d 1287, 1295–1297; 16 Brooklyn L.Rev. 286 (1950); 50 Colum.L.Rev. 529 (1950); 35 Cornell L.Q. 872 (1950). Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby* v. *United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves. The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); California Evidence Code § 1300; Kansas Code of Civil Procedure § 60–460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London* v. *Clerke*, Carth. 181, 90 Eng.Rep. 710 (K.B. 1691); *Neill* v. *Duke of Devonshire*, 8 App.Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph [paragraph] (23) goes no further, not even including character.

The leading case in the *United States, Patterson* v. *Gaines*, 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros. Construction Co.* v. *United States*, 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States* v. *Mid-Continent Petroleum Corp.*, 67 F.2d 37 (10th Cir. 1933), records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy* v. *Cahill*, 81 F.2d 809 (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. *Contra*, In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295–300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, 18 U.S.C. 3500. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in 28 U.S.C. 1732. Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with rule 35 of the Federal Rules of Civil Procedure which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act [18 U.S.C. § 3500].

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis* v. *Bradley* [65 Conn. 99, 31 Atl. 591 (1894); see, also *Rathbun* v. *Brancatella*, 93 N.J.L. 222, 107 Atl. 279 (1919); see, also McCormick on Evidence, § 303 (2d ed. 1972)].

The committee also accepts the understanding of the House that a memorandum or report, although barred under rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors—e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment. [See Nev. Rev. Stats. § 15.135; N. Mex. Stats. (1973 Supp.) § 20-4-803(6); West's Wis. Stats. Anno. (1973 Supp.) § 908.03(6).]

Therefore, the committee deleted the word "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this rep-

resents the desired rule in light of the complex nature of modern business organizations.

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule 804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of [proposed] rule 804(b)(5) [deleted], which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

* * * * * *

Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, *Franklin* v. *Skelly Oil Co.*, 141 F.2d 568 (19th Cir. 1944); (4) possible motivation problems suggested by *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

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The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6)[(5)]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trustworthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness and necessity could properly be admissible.

The case of *Dallas County* v. *Commercial Union Assoc. Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit which any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. *See*

also United States v. *Barbati*, 284 F.Supp. 409 (E.D.N.Y. 1968).

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment ([proposed] Rule 804(b)(5)—Criminal law enforcement records and reports [deleted]).

In view of its action on [proposed] Rule 804(b)(5) (Criminal law enforcement records and reports) [deleted], the Conference does not adopt the Senate amendment and restores the bill to the House version.

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

1975 AMENDMENT

Exception (23). Pub.L. 94-149 inserted a comma immediately after "family" in catchline.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(As amended Pub.L. 94–149, § 1(12), (13), Dec. 12, 1975, 89 Stat. 806.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

Subdivision (a). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt* v. *State*, 35 Ala.App. 147, 46

So.2d 837 (1950); *State* v. *Stewart*, 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code § 240(a)(1); Kansas Code of Civil Procedure § 60–459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson* v. *People*, 152 Colo. 586, 384 P.2d 454 (1963); *People* v. *Pickett*, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). *Contra*, *Pleau* v. *State*, 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as ground. McCormick §§ 234, 257, 297; Uniform Rule 62(7)(c); California Evidence Code § 240(a)(3); Kansas Code of Civil Procedure § 60–459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in Rule 32(a)(3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick § 234; Uniform Rule 62(7)(d) and (e); California Evidence Code § 240(a)(4) and (5); Kansas Code of Civil Procedure § 60–459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in *Barber* v. *Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant.

Subdivision (b). Rule 803 *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

Exception (1). Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, *supra*. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e. by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick § 246, pp. 526–527; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L.Rev. 651, n. 1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.* Testimony given at a

preliminary hearing was held in *California* v. *Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra*, at 652; McCormick § 232, pp. 487–488. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. This position is supported by modern decisions. McCormick § 232, pp. 489–490; 5 Wigmore § 1388.

Provisions of the same tenor will be found in Uniform Rule 63(3)(b); California Evidence Code §§ 1290–1292; Kansas Code of Civil Procedure § 60–460(c)(2); New Jersey Evidence Rule 63(3). Unlike the rule, the latter three provide either that former testimony is not admissible if the right of confrontation is denied or that it is not admissible if the accused was not a party to the prior hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. *Mattox* v. *United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), held that the right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the questions (1) whether direct and redirect are equivalent to cross-examination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose Professor Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation. Falknor, *supra*, at 659–660. The constitutional acceptability of dying declarations has often been conceded. *Mattox* v. *United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Kirby* v. *United States*, 174 U.S. 47, 61, 19 S.Ct. 574, 43 L.Ed. 890 (1899); *Pointer* v. *Texas*, 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Exception (2). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in *Rex* v. *Woodcock*, 1 Leach 500, 502, 168 Eng.Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g. a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52–1–20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 224, n. 4. Kansas by decision extended the exception to civil cases. *Thurston* v. *Fritz*, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of first-hand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63(5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60–460(e); New Jersey Evidence Rule 63(5).

Exception (3). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *Hileman* v. *Northwest Engineering Co.*, 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. *Higham* v. *Ridgeway*, 10 East 109, 103 Eng.Rep. 717 (K.B. 1808); *Reg.* v. *Overseers of Birmingham*, 1 B. & S. 763, 121 Eng.Rep. 897 (Q.B. 1861); McCormick, § 256, p. 551, nn. 2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548–549. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly* v. *United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. *People* v. *Spriggs*, 60 Cal.2d

868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964); *Sutter* v. *Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Band's Refuse Removal, Inc.* v. *Fairlawn Borough*, 62 N.J.Super. 552, 163 A.2d 465 (1960); *Newberry* v. *Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence and, hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and *Bruton* v. *United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against dissenting aspects of a declaration is discussed in McCormick § 256.

For comparable provisions, see Uniform Rule 63(10); California Evidence Code § 1230; Kansas Code of Civil Procedure § 60–460(j); New Jersey Evidence Rule 63(10).

Exception (4). The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i)[(A)] specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii)[(B)] deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id.*, § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id.*, § 1491.

For comparable provisions, see Uniform Rule 63(23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60–460(u), (v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States* v. *Insana*, 423 F.2d 1165, 1169–1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970).

Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed "unavailable", that he be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." The Committee amended the Rule to insert after the word "attendance" the parenthetical expression "(or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)". The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Rule 804(b)(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner* v. *Antonio Triano Tile and Marble Co.*, 410 F.2d 238 (D.C. Cir. 1968). Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See *United States* v. *Dovico*, 380 F.2d 325, 327nn.2,4 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corrobation was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as *Donnelly* v. *United States*, 228 U.S. 243 (1912), where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule, since in that even the declarant would not be "unavailable".

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Subdivision (a) of rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable."

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases. [Uniform rule 63(10); Kan. Stat. Anno. 60–460(j); 2A N.J. Stats. Anno. 84–63(10).]

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amenable to process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Former testimony.—Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness.

The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the

difference between the two versions is not great and we accept the House amendment.

The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e.g., tort cases, this deletion could be misconstrued.

Three States which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i.e., that a statement is against interest if it tends to subject a declarant to civil liability. [Nev. Rev. Stats. § 51.345; N. Mex. Stats. (1973 supp.) § 20–4–804(4); West's Wis. Stats. Anno. (1973 supp.) § 908.045(4).]

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to supra, would admit such statements), we accept the deletion by the House.

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton* v. *United States*, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e.g. where the codefendant takes the stand and is subject to cross examination; where the accused confessed, see *United States* v. *Mancusi*, 404 F.2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1907); where the accused was placed at the scene of the crime, see *United States* v. *Zelker*, 452 F.2d 1009 (2d Cir. 1971). For these reasons, the committee decided to delete this provision.

Note to Subdivision (b)(5). See Note to Paragraph (24), Notes of Committee on the Judiciary, Senate Report No. 93–1277, set out as a note under rule 803 of these rules.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

Rule 804 defines what hearsay statements are admissible in evidence if the declarant is unavailable as a witness. The Senate amendments make four changes in the rule.

Subsection (a) defines the term "unavailability as a witness". The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's *testimony* (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

The Senate amendment adds a new subsection, (b)(6) [now (b)(5)], which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a

statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare the contest the use of the statement.

1975 AMENDMENT

Pub.L. 94–149, § 1(12), substituted a semicolon for the colon in catchline.

Subd. (b)(3). Pub.L. 94–149, § 1(13), substituted "admissible" for "admissable".

Rule 805. Hearsay within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principle difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. The cases, however, are divided. Cases allowing the impeachment include *People* v. *Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *People* v. *Rosoto*, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P.2d 867 (1962); *Carver* v. *United States*, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897). *Contra*, *Mattox* v. *United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *People* v. *Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g. a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be

concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following:

"* * * and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent."

This language did not appear in the rule as promulgated in December, 1937. See 4 Moore's Federal Practice ¶¶ 26.01[9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule:

"Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S.Neb. § 25–1267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code § 1202; Kansas Code of Civil Procedure § 60–462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code § 1203.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Rule 906, as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d) and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in rule 801(d)(2)(c), (d) and (e)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility. [The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility].

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93–1597

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand.L.Rev. 344, 362 (1952); McCormick §§ 179, 185; Morgan, Basic Problems of Evidence 378 (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity fails in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, *infra*. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b). The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1). Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See California Evidence Code § 1413, eyewitness to signing.

Example (2). Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. See also California Evidence Code § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3). The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991–1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Viet., c. 125, § 27, cautiously allowed

expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country, e.g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury, as in *Evans* v. *Commonwealth*, 230 Ky. 411, 19 S.W.2d 1091 (1929), or by experts, Annot. 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. *Brandon* v. *Collins*, 267 F.2d 731 (2d Cir. 1959); *Wausau Sulphate Fibre Co.* v. *Commissioner of Internal Revenue*, 61 F.2d 879 (7th Cir. 1932); *Desimone* v. *United States*, 227 F.2d 864 (9th Cir. 1955).

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co.* v. *Braniff*, 89 Okl. 105, 214 P. 127 (1923); California Evidence Code § 1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick § 192; California Evidence Code § 1420. Language patterns may indicate authenticity or its opposite. *Magnuson* v. *State*, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L.Rev. 19 (1956).

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), *supra*, *People* v. *Nichols*, 378 Ill. 487, 38 N.E.2d 766 (1942); *McGuire* v. *State*, 200 Md. 601, 92 A.2d 582 (1952); *State* v. *McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935).

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), *supra*, or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton* v. *Hoover Co.*, 350 Mo. 506, 166 S.W.2d 557 (1942); *City of Pawhuska* v. *Crutchfield*, 147 Okl. 4, 293 P. 1095 (1930); *Zurich General Acc. & Liability Ins. Co.* v. *Baum*, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick & 193; 7 Wigmore § 2155; Annot., 71 A.L.R. 5, 105 id. 326.

Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code §§ 1532, 1600.

Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S. 1963, § 41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190.

Example (9). Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer, as to which see *Transport Indemnity Co.* v. *Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965); *State* v. *Veres*, 7 Ariz.App. 117, 436 P.2d 629 (1968); *Merrick* v. *United States Rubber Co.*, 7 Ariz.App. 433, 440 P.2d 314 (1968); Freed, Computer Print-Outs as Evidence, 16 Am. Jur. Proof of Facts 273; Symposium, Law and Computers in the Mid-Sixties, ALI-ABA (1966); 37 Albany L.Rev. 61

(1967). Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

Example (10). The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in 28 U.S.C. § 753(b) and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

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Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; California Evidence Code § 1452. More than 50 provisions

for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; California Evidence Code § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3). provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. 39 U.S.C. § 4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co.* v. *Johnson*, 163 Miss. 426, 141 So. 762 (1932), Baby Ruth candy bar; *Doyle* v. *Continental Baking Co.*, 262 Mass. 516, 160 N.E. 325 (1928), loaf of bread; *Weiner* v. *Mager & Throne, Inc.*, 167 Misc. 338, 3 N.Y.S.2d 918 (1938), same. And see W.Va.Code 1966, § 47–3–5, trade-mark on bottle prima facie evidence of ownership. *Contra, Keegan* v. *Green Giant Co.*, 150 Me. 283, 110 A.2d 599 (1954); *Murphy* v. *Campbell Soup Co.*, 62 F.2d 564 (1st Cir. 1933). Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, § 46–606; *State* v. *Wolfley*, 75 Kan. 406, 89 P. 1046 (1907); Annot., 11 L.R.A.(N.S.) 87. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry.* v. *Callaghan*, 157 Ill. 406, 41 N.E. 909 (1895); 9 Wigmore § 2510a. See also the provision of 19 U.S.C. § 1615(2) that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are California Evidence Code § 1451 and N.Y.CPLR 4538, McKinney's Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rule 302, *supra*. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Cf. *United States* v. *Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complication inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams* v. *Walker-Thomas-Furniture Co.*, 121 U.S.App.D.C. 315, 350 F.2d 445 (1965). Pertinent Code provisions are sections 1–202, 3–307, and 3–510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, 10 U.S.C. § 936, signature, without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial power; 15 U.S.C. § 77f(a), signature on SEC registration presumed genuine; 26 U.S.C. § 6064, signature to tax return prima facie genuine.

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Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to

take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g. wills in some states. McCormick § 188. Uniform Rule 71; California Evidence Code § 1411; Kansas Code of Civil Procedure § 60–468; New Jersey Evidence Rule 71; New York CPLR Rule 4537.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) **Writings and recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

In an earlier day, when discovery and other related procedures were strictly limited, the misleading named "best evidence rule" afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L.Rev. 825 (1966).

Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

Paragraph (3). In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. *Transport Indemnity Co.* v. *Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965).

Paragraph (4). The definition describes "copies" produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced

are given the status of originals in large measure by Rule 1003, *infra*. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate. This result is substantially consistent with 28 U.S.C. § 1732(b). Compare 26 U.S.C. § 7513(c), giving full status as originals to photographic reproductions of tax returns and other documents, made by authority of the Secretary of the Treasury, and 44 U.S.C. § 399(a), giving original status to photographic copies in the National Archives.

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The Committee amended this Rule expressly to include "video tapes" in the definition of "photographs."

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

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The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra*.

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. Paradis, The Celluloid Witness, 37 U.Colo.L. Rev. 235, 249-251 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See *People* v. *Doggett*, 83 Cal.App.2d 405, 188 P.2d 792 (1948) photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence—Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original. *Daniels* v. *Iowa City*, 191 Iowa 811, 183 N.W. 415 (1921); *Cellamare* v. *Third Acc. Transit Corp.*, 273 App.Div. 260, 77 N.Y.S.2d 91 (1948); *Patrick & Tilman* v. *Matkin*, 154 Okl. 232, 7 P.2d 414 (1932); *Mendoza* v. *Rivera*, 78 P.R.R. 569 (1955).

It should be noted, however, that Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The reference to Acts of Congress is made in view of such statutory provisions as 26 U.S.C. § 7513, photographic reproductions of tax returns and documents, made by authority of the Secretary of the Treasury, treated as originals, and 44 U.S.C. § 399(a), photographic copies in National Archives treated as originals.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions, *Myrick* v. *United States*, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; *Johns* v. *United States*, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; *Sauget* v. *Johnston*, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be present when only a part of the

original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. *United States* v. *Alexander*, 326 F.2d 736 (4th Cir. 1964). And see *Toho Bussan Kaisha, Ltd.* v. *American President Lines, Ltd.*, 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

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The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original."

Rule 1004. Admissibility of other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick § 207.

Paragraph (1). Loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick § 201.

Paragraph (2). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202.

Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

Paragraph (4). While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co.* v. *Little Rock Publishing Co.*, 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, *Chicago City Ry. Co.* v. *Carroll*, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1.

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The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215–1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original.

The provisions of 28 U.S.C. § 1733(b) apply only to departments or agencies of the United States. The rule, however, applies to public records generally and is comparable in scope in this respect to Rule 44(a) of the Rules of Civil Procedure.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

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The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore § 1230.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

While the parent case, *Slatterie* v. *Pooley*, 6 M. & W. 664, 151 Eng.Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra*.

A similar provision is contained in New Jersey Evidence Rule 70(1)(h).

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra*. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra*, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L.Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra*.

For similar provisions, see Uniform Rule 70(2); Kansas Code of Civil Procedure § 60-467(b); New Jersey Evidence Rule 70(2), (3).

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

(a) Courts and magistrates. These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the United States Claims Court, and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States magistrates.

(b) Proceedings generally. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and

proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

(c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310–318 of the Immigration and Nationality Act (8 U.S.C. 1421–1429); prize proceedings in admiralty under sections 7651–7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581–1624), or under the Anti-Smuggling Act (19 U.S.C. 1701–1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256–258); habeas corpus under sections 2241–2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781–790), as implemented by section 7730 of title 10, United States Code.

(As amended Pub.L. 94–149, § 1(14), Dec. 12, 1975, 89 Stat. 806; Pub.L. 95–598, Title II, § 251, Nov. 6, 1978, 92 Stat. 2673; Pub.L. 97–164, Title I, § 142, Apr. 2, 1982, 96 Stat. 45.)

Amendment of Subsec. (a)

Pub.L. 95–598, Title II, § 252, Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2673, 2682, effective Apr. 1, 1984, provided that, as amended by Pub.L. 97–164, Title I, § 142, Apr. 2, 1982, 96 Stat. 45, subd. (a) of this rule is amended to read as follows:

(a) Courts and magistrates. These rules apply to the United States district courts, the United States bankruptcy courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the United States Claims Court, and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States magistrates.

The April 1, 1984, effective date was further extended to June 28, 1984, by amendments to section 402(b) of Pub.L. 95–598 by Pub.L. 98–249, § 1(a), Mar. 31, 1984, 98 Stat. 116; Pub.L. 98–271, § 1(a), Apr. 30, 1984, 98 Stat. 163; Pub.L. 98–299, § 1(a), May 25, 1984, 98 Stat. 214; and Pub.L. 98–325, § 1(a), June 20, 1984, 98 Stat. 268. Thereafter, section 402(b) of Pub.L. 95–598 was amended by section 113 of Pub.L. 98–353, Title I, July 10, 1984, 98 Stat. 343, effective June 27, 1984 pursuant to section 122(c) of Pub.L. 98–353, by substituting "shall not be effective" for "shall take effect on June 28, 1984", thereby eliminating the amendment by section 252 of Pub.L. 95–598. However, section 121(a) of Pub.L. 98–353 has also amended section 402(b) of Pub.L. 95–598 by substituting "the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 [i.e. July 10, 1984]" for "June 28, 1984".

Bankruptcy Transition Provisions

See Pub.L. 95–598, Title IV, § 405(b), Nov. 6, 1978, 92 Stat. 2685.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The various enabling acts contain differences in phraseology in their descriptions of the courts over which the Supreme Court's power to make rules of practice and procedure extends. The act concerning civil actions, as amended in 1966, refers to "the district courts * * * of the United States in civil actions, including admiralty and maritime cases. * * *" 28 U.S.C. § 2072, Pub.L. 89-773, § 1, 80 Stat. 1323. The bankruptcy authorization is for rules of practice and procedure "under the Bankruptcy Act." 28 U.S.C. § 2075, Pub.L. 88-623, § 1, 78 Stat. 1001. The Bankruptcy Act in turn creates bankruptcy courts of "the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable." 11 U.S.C. §§ 1(10), 11(a). The provision as to criminal rules up to and including verdicts applies to "criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the districts of the Canal Zone and Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates." 18 U.S.C. § 3771.

These various provisions do not in terms describe the same courts. In congressional usage the phrase "district courts of the United States," without further qualification, traditionally has included the district courts established by Congress in the states under Article III of the Constitution, which are "constitutional" courts, and has not included the territorial courts created under Article IV, Section 3, Clause 2, which are "legislative" courts. *Hornbuckle* v. *Toombs*, 85 U.S. 648, 21 L.Ed. 966 (1873). However, any doubt as to the inclusion of the District Court for the District of Columbia in the phrase is laid at rest by the provisions of the Judicial Code constituting the judicial districts, 28 U.S.C. § 81 et seq. creating district courts therein, *Id.* § 132, and specifically providing that the term "district court of the United States" means the courts so constituted. *Id.* § 451. The District of Columbia is included. *Id.* § 88. Moreover, when these provisions were enacted, reference to the District of Columbia was deleted from the original civil rules enabling act. 28 U.S.C. § 2072. Likewise Puerto Rico is made a district, with a district court, and included in the term. *Id.* § 119. The question is simply one of the extent of the authority conferred by Congress. With respect to civil rules it seems clearly to include the district courts in the states, the District Court for the District of Columbia, and the District Court for the District of Puerto Rico.

The bankruptcy coverage is broader. The bankruptcy courts include "the United States district courts," which includes those enumerated above. Bankruptcy courts also include "the district courts of the Territories and possessions to which this title is or may hereafter be applicable." 11 U.S.C. §§ 1(10), 11(a). These courts include the district courts of Guam and the Virgin Islands. 48 U.S.C. §§ 1424(b), 1615. Professor Moore points out that whether the District Court for the District of the Canal Zone is a court of bankruptcy "is not free from doubt in view of the fact that no other statute expressly or inferentially provides for the applicability of the Bankruptcy Act in the Zone." He further observes that while there seems to be little doubt that the Zone is a territory or possession within the meaning of the Bankruptcy Act, 11 U.S.C. § 1(10), it must be noted that the appendix to the Canal Zone Code of 1934 did not list the Act among the laws of the United States applicable to the Zone. 1 Moore's Collier on Bankruptcy ¶ 1.10, pp. 67, 72, n. 25 (14th ed. 1967). The Code of 1962 confers on the district court jurisdiction of:

"(4) actions and proceedings involving laws of the United States applicable to the Canal Zone; and

"(5) other matters and proceedings wherein jurisdiction is conferred by this Code or any other law." Canal Zone Code, 1962, Title 3, § 141.

Admiralty jurisdiction is expressly conferred. *Id.* § 142. General powers are conferred on the district court, "if the course of proceeding is not specifically prescribed by this Code, by the statute, or by applicable rule of the Supreme Court of the United States * * *" *Id.* § 279. Neither these provisions nor § 1(10) of the Bankruptcy Act ("district courts of the Territories and possessions to which this title is or may hereafter be applicable") furnishes a satisfactory answer as to the status of the District Court for the District of the Canal Zone as a court of bankruptcy. However, the fact is that this court exercises no bankruptcy jurisdiction in practice.

The criminal rules enabling act specifies United States district courts, district courts for the districts of the Canal Zone and the Virgin Islands, the Supreme Court of the Commonwealth of Puerto Rico, and proceedings before United States commissioners. Aside from the addition of commissioners, now magistrates, this scheme differs from the bankruptcy pattern in that it makes no mention of the District Court of Guam but by specific mention removes the Canal Zone from the doubtful list.

The further difference in including the Supreme Court of the Commonwealth of Puerto Rico seems not to be significant for present purposes, since the Supreme Court of the Commonwealth of Puerto Rico is an appellate court. The Rules of Criminal Procedure have not been made applicable to it, as being unneeded and inappropriate, Rule 54(a) of the Federal Rules of Criminal Procedure, and the same approach is indicated with respect to rules of evidence.

If one were to stop at this point and frame a rule governing the applicability of the proposed rules of evidence in terms of the authority conferred by the three enabling acts, an irregular pattern would emerge as follows:

Civil actions, including admiralty and maritime cases—district courts in the states, District of Columbia, and Puerto Rico.

Bankruptcy—same as civil actions, plus Guam and Virgin Islands.

Criminal cases—same as civil actions, plus Canal Zone and Virgin Islands (but not Guam).

This irregular pattern need not, however, be accepted. Originally the Advisory Committee on the Rules of Civil Procedure took the position that, although the phrase "district courts of the United States" did not include territorial courts, provisions in the organic laws of Puerto Rico and Hawaii would make the rules applicable to the district courts thereof, though this would not be so as to

Alaska, the Virgin Islands, or the Canal Zone, whose organic acts contained no corresponding provisions. At the suggestion of the Court, however, the Advisory Committee struck from its notes a statement to the above effect. 2 Moore's Federal Practice ¶ 1.07 (2nd ed. 1967); 1 Barron and Holtzoff, Federal Practice and Procedure § 121 (Wright ed. 1960). Congress thereafter by various enactments provided that the rules and future amendments thereto should apply to the district courts of Hawaii, 53 Stat. 841 (1939), Puerto Rico, 54 Stat. 22 (1940), Alaska, 63 Stat. 445 (1949), Guam, 64 Stat. 384–390 (1950), and the Virgin Islands, 68 Stat. 497, 507 (1954). The original enabling act for rules of criminal procedure specifically mentioned the district courts of the Canal Zone and the Virgin Islands. The Commonwealth of Puerto Rico was blanketed in by creating its court a "district court of the United States" as previously described. Although Guam is not mentioned in either the enabling act or in the expanded definition of "district court of the United States," the Supreme Court in 1956 amended Rule 54(a) to state that the Rules of Criminal Procedure are applicable in Guam. The Court took this step following the enactment of legislation by Congress in 1950 that rules theretofore or thereafter promulgated by the Court in civil cases, admiralty, criminal cases and bankruptcy should apply to the District Court of Guam, 48 U.S.C. § 1424(b), and two Ninth Circuit decisions upholding the applicability of the Rules of Criminal Procedure to Guam. *Pugh* v. *United States*, 212 F.2d 761 (9th Cir. 1954); *Hatchett* v. *Guam*, 212 F.2d 767 (9th Cir. 1954); Orfield, The Scope of the Federal Rules of Criminal Procedure, 38 U. of Det.L.J. 173, 187 (1960).

From this history, the reasonable conclusion is that Congressional enactment of a provision that rules and future amendments shall apply in the courts of a territory or possession is the equivalent of mention in an enabling act and that a rule on scope and applicability may properly be drafted accordingly. Therefore the pattern set by Rule 54 of the Federal Rules of Criminal Procedure is here followed.

The substitution of magistrates in lieu of commissioners is made in pursuance of the Federal Magistrates Act, P.L. 90–578, approved October 17, 1968, 82 Stat. 1107.

Subdivision (b) is a combination of the language of the enabling acts, *supra*, with respect to the kinds of proceedings in which the making of rules is authorized. It is subject to the qualifications expressed in the subdivisions which follow.

Subdivision (c), singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules.

Subdivision (d). The rule is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing. Paragraph (1) restates, for convenience, the provisions of the second sentence of Rule 104(a), *supra*. See Advisory Committee's Note to that rule.

(2) While some states have statutory requirements that indictments by based on "legal evidence," and there is some case law to the effect that the rules of evidence apply to grand jury proceedings, 1 Wigmore § 4(5), the Supreme Court has not accepted this view. In *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1965), the Court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented.

"It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id.* at 364. The rule as drafted does not deal with the evidence required to support an indictment.

(3) The rule exempts preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meagre and conflicting. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1168, n. 53 (1960); Comment, Preliminary Hearings on Indictable Offenses in Philadelphia, 106 U. of Pa.L. Rev. 589, 592–593 (1958). Hearsay testimony is, however, customarily received in such examinations. Thus in a Dyer Act case, for example, an affidavit may properly be used in a preliminary examination to prove ownership of the stolen vehicle, thus saving the victim of the crime the hardship of having to travel twice to a distant district for the sole purpose of testifying as to ownership. It is believed that the extent of the applicability of the Rules of Evidence to preliminary examinations should be appropriately dealt with by the Federal Rules of Criminal Procedure which regulate those proceedings.

Extradition and rendition proceedings are governed in detail by statute. 18 U.S.C. §§ 3181–3195. They are essentially administrative in character. Traditionally the rules of evidence have not applied. 1 Wigmore § 4(6). Extradition proceedings are accepted from the operation of the Rules of Criminal Procedure. Rule 54(b)(5) of Federal Rules of Criminal Procedure.

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. Rule 32(c) of the Federal Rules of Criminal Procedure requires a presentence investigation and report in every case unless the court otherwise directs. In *Williams* v. *New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), in which the judge overruled a jury recommendation of life imprisonment and imposed a death sentence, the Court said that due process does not require confrontation or cross-examination in sentencing or passing on probation, and that the judge has broad discretion as to the sources and types of information relied upon. Compare the recommendation that the substance of all derogatory information be disclosed to the defendant, in A.B.A. Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.4, Tentative Draft (1967, Sobeloff, Chm.). Williams was adhered to in *Specht* v. *Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), but not extended to a proceeding under the Colorado Sex Offenders Act, which was said to be a new charge leading in effect to punishment, more like the recidivist statutes where opportunity must be given to be heard on the habitual criminal issue.

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. Rules 4(a) and 41(c) of the Federal Rules of Criminal Procedure. The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable.

Criminal contempts are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court. Rule 42(a) of the Federal Rules of Criminal Procedure. The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt.

Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides:

"Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." 18 U.S.C.A. § 3146(f). This provision is consistent with the type of inquiry contemplated in A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, § 4.5(b), (c), p. 16 (1968). The references to the weight of the evidence against the accused, in Rule 46(a)(1), (c) of the Federal Rules of Criminal Procedure and in 18 U.S.C.A. § 3146(b), as a factor to be considered, clearly do not have in view evidence introduced at a hearing under the rules of evidence.

The rule does not exempt habeas corpus proceedings. The Supreme Court held in *Walker* v. *Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941), that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" This view accords with the emphasis in *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), upon trial-type proceedings, *Id.* 311, 83 S.Ct. 745, with demeanor evidence as a significant factor, *Id.* 322, 83 S.Ct. 745, in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Subdivision (e). In a substantial number of special proceedings, *ad hoc* evaluation has resulted in the promulgation of particularized evidentiary provisions, by Act of Congress or by rule adopted by the Supreme Court. Well adapted to the particular proceedings, though not apt candidates for inclusion in a set of general rules, they are left undisturbed. Otherwise, however, the rules of evidence are applicable to the proceedings enumerated in the subdivision.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Subdivision (a) as submitted to the Congress, in stating the courts and judges to which the Rules of Evidence apply, omitted the Court of Claims and commissioners of that Court. At the request of the Court of Claims, the Committee amended the Rule to include the Court and its commissioners within the purview of the Rules.

Subdivision (b) was amended merely to substitute positive law citations for those which were not.

The Tariff Act of 1930, referred to in subsec. (e), is act June 17, 1930, ch. 497, 46 Stat. 590, which is classified principally to chapter 4 (§ 1202 et seq.) of Title 19, Customs Duties. Part V of title IV of the Tariff Act of 1930 enacted part V (§ 1581 et seq.) of subtitle III of chapter 4 of title 19. For complete classification of this Act to the Code, see section 1654 of Title 19 and Tables volume.

The Anti-Smuggling Act (19 U.S.C. 1701–1711), referred to in subsec. (e), is act Aug. 5, 1935, ch. 438, 49 Stat. 517, which enacted sections 1432a, 1601a, and 1701 to 1711 of Title 19, Customs Duties, and amended section 64 of former Title 14, Coast Guard, sections 70, 483, 1401, 1434, 1436, 1441, 1581, 1584 to 1587, 1591, 1592, 1615, 1619, and 1621 of title 19, and sections 60, 91, 106, 277, 288, 319, and 325 of Title 46, Shipping. For complete classification of this Act to the Code, see section 1711 of Title 19 and Tables volume.

The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301–392), referred to in subsec. (e), is act June 25, 1938, ch. 675, 52 Stat. 1040, which is classified generally to chapter 9 (§ 301 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see section 301 of Title 21 and Tables volume.

"An Act authorizing suits against the United States in admirality [sic] for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes," approved Mar. 3, 1925 (46 U.S.C. 781–790), referred to in subsec. (e), is act Mar. 3, 1925, ch. 428, 43 Stat. 1112, which is classified generally to chapter 22 (§ 781 et seq.) of Title 46, Shipping. For complete classification of this Act to the Code, see Tables volume.

1975 AMENDMENT

Subd. (e). Pub.L. 94–149 substituted "admiralty" for "admirality".

1978 AMENDMENT

Pub.L. 95–598 struck out ", referees in bankruptcy," preceding "and commissioners" in subd. (a), and substituted "title 11, United States Code" for "the Bankruptcy Act" in subd. (b).

1982 AMENDMENT

Subd. (a). Pub.L. 97–164 substituted "United States Claims Court" in the enumeration of courts to which these rules apply and struck out reference to commissioners of the Court of Claims in the definition of the terms "judge" and "court".

Effective Date. Amendment by Pub.L. 97–164 effective Oct. 1, 1982, pursuant to section 402 of Pub.L. 97–164.

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2076 of title 28 of the United States Code.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

FEDERAL RULES OF APPELLATE PROCEDURE

As amended to January 1, 1985

Title I. Applicability of Rules

Rule
1. Scope of Rules:
   (a) Scope of Rules.
   (b) Rules Not to Affect Jurisdiction.
2. Suspension of Rules.

Title II. Appeals from Judgments and Orders of District Courts

3. Appeal as of Right—How Taken:
   (a) Filing the Notice of Appeal.
   (b) Joint or Consolidated Appeals.
   (c) Content of the Notice of Appeal.
   (d) Service of the Notice of Appeal.
   (e) Payment of Fees.
4. Appeal as of Right—When Taken:
   (a) Appeals in Civil Cases.
   (b) Appeals in Criminal Cases.
5. Appeals by Permission Under 28 U.S.C. § 1292(b):
   (a) Petition for Permission to Appeal.
   (b) Content of Petition; Answer.
   (c) Form of Papers; Number of Copies.
   (d) Grant of Permission; Cost Bond; Filing of Record.
6. Appeals by Allowance in Bankruptcy Proceedings:
   (a) Petition for Allowance.
   (b) Content of Petition; Answer.
   (c) Form of Papers, Number of Copies.
   (d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record.
7. Bond for Costs on Appeal in Civil Cases.
8. Stay or Injunction Pending Appeal:
   (a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.
   (b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties.
   (c) Stays in Criminal Cases.
9. Release in Criminal Cases:
   (a) Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction.
   (b) Release Pending Appeal from a Judgment of Conviction.
   (c) Criteria for Release.
10. The Record on Appeal:
   (a) Composition of the Record on Appeal.
   (b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

Rule
10. The Record on Appeal—Cont'd
   (c) Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable.
   (d) Agreed Statement as the Record on Appeal.
   (e) Correction or Modification of the Record.
11. Transmission of the Record:
   (a) Duty of Appellant.
   (b) Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record.
   (c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers.
   (d) Extension of Time for Transmission of the Record; Reduction of Time (Abrogated).
   (e) Retention of the Record in the District Court by Order of Court.
   (f) Stipulation of Parties that Parts of the Record be Retained in the District Court.
   (g) Record for Preliminary Hearing in the Court of Appeals.
12. Docketing the Appeal; Filing of the Record:
   (a) Docketing the Appeal.
   (b) Filing the Record, Partial Record, or Certificate.
   (c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal (Abrogated).

Title III. Review of Decisions of the United States Tax Court

13. Review of Decisions of the Tax Court:
   (a) How Obtained; Time for Filing Notice of Appeal.
   (b) Notice of Appeal—How Filed.
   (c) Content of the Notice of Appeal; Service of the Notice; Effect of Filing and Service of the Notice.
   (d) The Record on Appeal; Transmission of the Record; Filing of the Record.
14. Applicability of other Rules to Review of Decisions of the Tax Court.

Title IV. Review and Enforcement of Orders of Administrative Agencies, Boards, Commissions and Officers

15. Review or Enforcement of Agency Orders—How Obtained; Intervention:
   (a) Petition for Review of Order; Joint Petition.
   (b) Application for Enforcement of Order; Answer; Default; Cross-Application for Enforcement.

Rule
15. Review or Enforcement of Agency Orders—How Obtained; Intervention—Cont'd
(c) Service of Petition or Application.
(d) Intervention.
16. The Record on Review or Enforcement:
(a) Composition of the Record.
(b) Omissions from or Misstatements in the Record.
17. Filing of the Record:
(a) Agency to File; Time for Filing; Notice of Filing.
(b) Filing—What Constitutes.
18. Stay Pending Review.
19. Settlement of Judgments Enforcing Orders.
20. Applicability of other Rules to Review or Enforcement of Agency Orders.

Title V. Extraordinary Writs

21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and other Extraordinary Writs:
(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.
(b) Denial; Order Directing Answer.
(c) Other Extraordinary Writs.
(d) Form of Papers; Number of Copies.

Title VI. Habeas Corpus; Proceedings in Forma Pauperis

22. Habeas Corpus Proceedings:
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(b) Necessity of Certificate of Probable Cause for Appeal.
23. Custody of Prisoners in Habeas Corpus Proceedings:
(a) Transfer of Custody Pending Review.
(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release.
(c) Release of Prisoner Pending Review of Decision Ordering Release.
(d) Modification of Initial Order Respecting Custody.
24. Proceedings in Forma Pauperis:
(a) Leave to Proceed on Appeal in Forma Pauperis from District Court to Court of Appeals.
(b) Leave to Proceed on Appeal or Review in Forma Pauperis in Administrative Agency Proceedings.
(c) Form of Briefs, Appendices and Other Papers.

Title VII. General Provisions

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(a) Filing.
(b) Service of all Papers Required.
(c) Manner of Service.
(d) Proof of Service.
26. Computation and Extension of Time:
(a) Computation of Time.

Rule
26. Computation and Extension of Time—Cont'd
(b) Enlargement of Time.
(c) Additional Time after Service by Mail.
27. Motions:
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(b) Determination of Motions for Procedural Orders.
(c) Power of a Single Judge to Entertain Motions.
(d) Form of Papers; Number of Copies.
28. Briefs:
(a) Brief of the Appellant.
(b) Brief of the Appellee.
(c) Reply Brief.
(d) References in Briefs to Parties.
(e) References in Briefs to the Record.
(f) Reproduction of Statutes, Rules, Regulations, Etc.
(g) Length of Briefs.
(h) Briefs in Cases Involving Cross Appeals.
(i) Briefs in Cases Involving Multiple Appellants or Appellees.
(j) Citation of Supplemental Authorities.
29. Brief of an Amicus Curiae.
30. Appendix to the Briefs:
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(b) Determination of Contents of Appendix; Cost of Producing.
(c) Alternative Method of Designating Contents of the Appendix; How References to the Record may be Made in the Briefs When Alternative Method is Used.
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(e) Reproduction of Exhibits.
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(b) Number of Copies to be Filed and Served.
(c) Consequence of Failure to File Briefs.
32. Form of Briefs, the Appendix and other Papers:
(a) Form of Briefs and the Appendix.
(b) Form of Other Papers.
33. Prehearing Conference.
34. Oral Argument:
(a) In General; Local Rule.
(b) Notice of Argument; Postponement.
(c) Order and Content of Argument.
(d) Cross and Separate Appeals.
(e) Non-Appearance of Parties.
(f) Submission on Briefs.
(g) Use of Physical Exhibits at Argument; Removal.
35. Determination of Causes by the Court in Banc:
(a) When Hearing or Rehearing in Banc Will be Ordered.
(b) Suggestion of a Party for Hearing or Rehearing in Banc.

Rule
35. Determination of Causes by the Court in Banc —Cont'd
(c) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate.
36. Entry of Judgment.
37. Interest on Judgments.
38. Damages for Delay.
39. Costs:
(a) To Whom Allowed.
(b) Costs For and Against the United States.
(c) Costs of Briefs, Appendices, and Copies of Records.
(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later.
(e) Costs on Appeal Taxable in the District Courts.
40. Petition for Rehearing:
(a) Time for Filing; Content; Answer; Action by Court if Granted.
(b) Form of Petition; Length.
41. Issuance of Mandate; Stay of Mandate.
(a) Date of Issuance.
(b) Stay of Mandate Pending Application for Certiorari.
42. Voluntary Dismissal.
(a) Dismissal in the District Court.
(b) Dismissal in the Court of Appeals.
43. Substitution of Parties:
(a) Death of a Party.

Rule
43. Substitution of Parties—Cont'd
(b) Substitution for Other Causes.
(c) Public Officers; Death or Separation from Office.
44. Cases Involving Constitutional Questions Where United States is not a Party.
45. Duties of Clerks:
(a) General Provisions.
(b) The Docket; Calendar; Other Records Required.
(c) Notice of Orders or Judgments.
(d) Custody of Records and Papers.
46. Attorneys:
(a) Admission to the Bar of a Court of Appeal; Eligibility; Procedure for Admission.
(b) Suspension or Disbarment.
(c) Disciplinary Power of the Court over Attorneys.
47. Rules by Courts of Appeals.
48. Title.

Appendix of Forms

Form
1. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court.
2. Notice of Appeal to a Court of Appeals from a Decision of the Tax Court.
3. Petition for Review of Order of an Agency, Board, Commission or Officer.
4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis.

ORDERS OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES

ORDER OF DECEMBER 4, 1967

1. That the following rules, to be known as the Federal Rules of Appellate Procedure, be, and they hereby are, prescribed, pursuant to sections 3771 and 3772 of Title 18, United States Code, and sections 2072 and 2075 of Title 28, United States Code, to govern the procedure in appeals to United States courts of appeals from the United States district courts, in the review by United States courts of appeals of decisions of the Tax Court of the United States, in proceedings in the United States courts of appeals for the review or enforcement of orders of administrative agencies, boards, commissions and officers, and in applications for writs or other relief which a United States court of appeals or judge thereof is competent to give:

[See text of Rules of Appellate Procedure, post]

2. That the foregoing rules shall take effect on July 1, 1968, and shall govern all proceedings in appeals and petitions for review or enforcement of orders thereafter brought and in all such proceedings then pending, except to the extent that in the opinion of the court of appeals their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed.

3. That Rules 6, 9, 41, 77 and 81 of the Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended, effective July 1, 1968, as hereinafter set forth:

[For text of amendments, see pamphlet containing Federal Rules of Civil Procedure]

4. That the chapter heading "IX. APPEALS", all of Rules 72, 73, 74, 75 and 76 of the Rules of Civil Procedure for the United States District Courts, and Form 27 annexed to the said rules, be, and they hereby are, abrogated, effective July 1, 1968.

5. That Rules 45, 49, 56 and 57 of the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended, effective July 1, 1968, as hereinafter set forth:

[See amendments made thereby under the Rules of Criminal Procedure, ante]

6. That the chapter heading "VIII. APPEAL", all of Rules 37 and 39, and subdivisions (b) and (c) of Rule 38, of the Rules of Criminal Procedure for the United States District Courts, and Forms 26 and 27 annexed to the said

rules, be, and they hereby are, abrogated, effective July 1, 1968.

7. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing new rules and amendments to and abrogation of existing rules, in accordance with the provisions of Title 18, U.S.C., § 3771, and Title 28, U.S.C., §§ 2072 and 2075.

ORDER OF MARCH 30, 1970

1. That subdivisions (a) and (c) of Rule 30 and subdivision (a) of Rule 31 of the Federal Rules of Appellate Procedure be, and they hereby are, amended as follows:

[See the amendments made thereby under the respective rules, post]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on July 1, 1970, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to existing rules, in accordance with the provisions of Title 18, U.S.C., § 3772, and Title 28, U.S.C., §§ 2072 and 2075.

ORDER OF MARCH 1, 1971

1. That subdivision (a) of Rule 6, paragraph (4) of subdivision (a) of Rule 27, paragraph (6) of subdivision (b) of Rule 30, subdivision (c) of Rule 77, and paragraph (2) of subdivision (a) of Rule 81 of the Federal Rules of Civil Procedure be, and hereby are, amended, effective July 1, 1971, to read as follows:

[For text of amendments, see pamphlet containing Federal Rules of Civil Procedure]

2. That subdivision (a) of Rule 45 and all of Rule 56 of the Federal Rules of Criminal Procedure be, and they hereby are, amended, effective July 1, 1971, to read as follows:

[See amendments made thereby under the respective Rules of Criminal Procedure, ante]

3. That subdivision (a) of Rule 26 and subdivision (a) of Rule 45 of the Federal Rules of Appellate Procedure be, and they hereby are, amended, effective July 1, 1971, to read as follows:

[See amendments made thereby under the respective rules, post]

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Rules of Civil, Criminal and Appellate Procedure, in accordance with the provisions of Title 18, U.S.C., § 3771, and Title 28, U.S.C., §§ 2072 and 2075.

Mr. Justice Black and Mr. Justice Douglas dissent.

ORDER OF APRIL 24, 1972

1. That Rules 1, 3, 4(b) & (c), 5, 5.1, 6(b), 7(c), 9(b), (c) & (d), 17(a) & (g), 31(e), 32(b), 38(a), 40, 41, 44, 46, 50, 54 and 55 of the Federal Rules of Criminal Procedure by, and they hereby are, amended effective October 1, 1972, to read as follows:

[See amendments made thereby under the respective Rules of Criminal Procedure, ante]

2. That Rule 9(c) of the Federal Rules of Appellate Procedure be, and hereby is amended, effective October 1, 1972, to read as follows:

[See amendments made thereby under the respective rules, post]

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to Rules of Criminal and Appellate Procedure, in accordance with the provisions of Title 18, U.S. Code, §§ 3771 and 3772.

Mr. Justice Douglas dissented to adoption of Rule 50(b) of the Federal Rules of Criminal Procedure.

ORDER OF APRIL 30, 1979

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Rules 1(a), 3(c), (d) and (e), 4(a), 5(d), 6(d), 7, 10(b), 11(a), (b), (c) and (d), 12, 13(a), 24(b), 27(b), 28(g) and (j), 34(a) and (b), 35(b) and (c), 39(c) and (d), and 40 as hereinafter set forth:

[See amendments made thereby under the respective rules, post]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on August 1, 1979, and shall govern all appellate proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 3772 of Title 18, United States Code, and Sections 2072 and 2075 of Title 28, United States Code.

TITLE I. APPLICABILITY OF RULES

Rule 1. Scope of Rules

(a) Scope of Rules.—These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

(b) Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

These rules are drawn under the authority of 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)) (Rules of Civil Procedure); 28 U.S.C. § 2075 (Bankruptcy Rules); and 18 U.S.C. §§ 3771 (Procedure to and including verdict) and 3772 (Procedure after verdict). Those statutes combine to give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals. By the terms of the statutes, after the rules have taken effect all laws in conflict with them are of no further force or effect. Practice and procedure in the eleven courts of appeals are now regulated by rules promulgated by each court under the authority of 28 U.S.C. § 2071. Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules.

As indicated by the titles under which they are found, the following rules are of special application: Rules 3 through 12 apply to appeals from judgments and orders of the district courts; Rules 13 and 14 apply to appeals from decisions of the Tax Court (Rule 13 establishes an appeal as the mode of review of decisions of the Tax Court in place of the present petition for review); Rules 15 through 20 apply to proceedings for review or enforcement of orders of administrative agencies, boards, commissions and officers. Rules 22 through 24 regulate habeas corpus proceedings and appeals in forma pauperis. All other rules apply to all proceedings in the courts of appeals.

1979 AMENDMENT

The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process, whether they take place in the district court or in the court of appeals, and with their adoption Rules 72–76 of the F.R.C.P. were abrogated. In some instances, however, the F.R.A.P. provide that a motion or application for relief may, or must, be made in the district court. See Rules 4(a), 10(b), and 24. The proposed amendment would make it clear that when this is so the motion or application is to be made in the form and manner prescribed by the F.R.C.P. or F.R.Cr.P. and local rules relating to the form and presentation of motions and is not governed by Rule 27 of the F.R.A.P. See Rule 7(b) of the F.R.C.P. and Rule 47 of the F.R.Cr.P.

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may

include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) Service of the Notice of Appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

(e) Payment of Fees. Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

General Note. Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," *United States* v. *Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules (FRCP 5(e), 73; FRCrP 37), and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules. Illustrative decisions are: *Fallen* v. *United States*, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964) (notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); *Richey* v. *Wilkins*, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); *Halfen* v. *United States*, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); *Riffle* v. *United States*, 299 F.2d 802 (5th Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing "a liberal view of papers filed by indigent and incarcerated defendants" are listed in *Coppedge* v. *United States*, 369 U.S. 438, 442, n. 5, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

Subdivision (a). The substance of this subdivision is derived from FRCP 73(a) and FRCrP 37(a)(1). The proposed rule follows those rules in requiring nothing other than the filing of a notice of appeal in the district court for the perfection of the appeal. The petition for allowance (except for appeals governed by Rules 5 and 6), citations, assignments of error, summons and severance—all specifically abolished by earlier modern rules—are assumed to be sufficiently obsolete as no longer to require pointed abolition.

Subdivision (b). The first sentence is derived from FRCP 74. The second sentence is added to encourage consolidation of appeals whenever feasible.

Subdivision (c). This subdivision is identical with corresponding provisions in FRCP 73(b) and FRCrP 37(a)(1).

Subdivision (d). This subdivision is derived from FRCP 73(b) and FRCrP 37(a)(1). The duty of the clerk to forward a copy of the notice of appeal and of the docket entries to the court of appeals in a criminal case extended to habeas corpus and 28 U.S.C. § 2255 proceedings.

1979 AMENDMENT

Note to Subdivision (c). The proposed amendment would add the last sentence. Because of the fact that the timely filing of the notice of appeal has been characterized as jurisdictional (See, e.g., *Brainerd* v. *Beal* (CA7th, 1974) 498 F.2d 901, in which the filing of a notice of appeal one day late was fatal), it is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. See, e.g., *Cobb* v. *Lewis* (CA5th, 1974) 488 F.2d 41; *Holley* v. *Capps* (CA5th, 1972) 468

F.2d 1366. The proposed amendment would give recognition to this practice.

When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) of the F.R.C.P. See Note to Rule 4(a)(6), *infra*.

Note to Subdivision (d). The proposed amendment would extend to civil cases the present provision applicable to criminal cases, habeas corpus cases, and proceedings under 28 U.S.C. § 2255, requiring the clerk of the district court to transmit to the clerk of the court of appeals a copy of the notice of appeal and of the docket entries, which should include reference to compliance with the requirements for payment of fees. See Note to (e), *infra*.

This requirement is the initial step in proposed changes in the rules to place in the court of appeals an increased practical control over the early steps in the appeal.

Note to Subdivision (e). Proposed new Rule 3(e) represents the second step in shifting to the court of appeals the control of the early stages of an appeal. See Note to Rule 3(d) above. Under the present rules the payment of the fee prescribed by 28 U.S.C. 1917 is not covered. Under the statute, however, this fee is paid to the clerk of the district court at the time the notice of appeal is filed. Under present Rule 12, the "docket fee" fixed by the Judicial Conference of the United States under 28 U.S.C. § 1913 must be paid to the clerk of the court of appeals within the time fixed for transmission of the record, ". . . and the clerk shall thereupon enter the appeal upon the docket."

Under the proposed new Rule 3(e) both fees would be paid to the clerk of the district court at the time the notice of appeal is filed, the clerk of the district court receiving the docket fee on behalf of the court of appeals.

In view of the provision in Rule 3(a) that "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal," the case law indicates that the failure to prepay the statutory filing fee does not constitute a jurisdictional defect. See *Parissi* v. *Telechron*, 349 U.S. 46 (1955); *Gould* v. *Members of N.J. Division of Water Policy & Supply*, 555 F.2d 340 (3d Cir. 1977). Similarly, under present Rule 12, failure to pay the docket fee within the time prescribed may be excused by the court of appeals. See, e.g., *Walker* v. *Mathews*, 546 F.2d 814 (9th Cir. 1976). Proposed new Rule 3(e) adopts the view of these cases, requiring that both fees be paid at the time the notice of appeal is filed, but subject to the provisions of Rule 26(b) preserving the authority of the court of appeals to permit late payment.

Rule 4. Appeal as of Right—When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). This subdivision is derived from FRCP 73(a) without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b). *North Umberland Mining Co.* v. *Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952); *Cohen* v. *Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962); *Plant Economy, Inc.* v. *Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of section 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under section 25, oblige an aggrieved party to appeal within 30 days after entry of judgment—the time fixed by this subdivision in cases involving private parties only—by serving him with notice of entry on the day thereof, and by the terms of section 25 an aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, section 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cases referred to in section 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein* v. *Reikes*, 54 F.2d 481 (2d Cir., 1931), *cert. den.*, 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶ 24.12 through ¶ 24.36 (1962). As a result it is not always clear whether an appeal is governed by section 25 or by FRCP 73(a), which is applicable to such appeals in bankruptcy as are not governed by section 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions of a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶ 73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) without change of substance.

1979 AMENDMENT

Note to Subdivision (a)(1). The words "(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)," which appear in the present rule are struck out as unnecessary and perhaps misleading in suggesting that there may be other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b).

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "or." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. See Notes to Rule 4(a)(2) and (4), below.

Note to Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provi-

sion in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., *Matter of Grand Jury Empanelled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge* v. *Hodge*, 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh* v. *Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby* v. *Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau* v. *Diamond Nat'l Corp.*, 345 F.2d 469 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Note to Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., *Kieth* v. *Newcourt*, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. *Stokes* v. *Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Note to Subdivision (a)(5). Under the present rule it is provided that upon a showing of excusable neglect the district court at any time may extend the time for the filing of a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule, but that if the application is made after the original time has run, the order may be made only on motion with such notice as the court deems appropriate.

A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in *In re Orbitek*, 520 F.2d 358 (2d Cir. 1975). The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered.

Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made *ex parte*. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. and local rules of the district court. See Note to proposed amended Rule 1, *supra*. And see Rules 6(d), 7(b) of the F.R.C.P.

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Note to Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. that the judgment constitute a separate document. See *United States* v. *Indrelunas*, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 48 is not jurisdictional, (see *Bankers Trust Co.* v. *Mallis*, 431 U.S. 928 (1977)), compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

Rule 5. Appeals by Permission Under 28 U.S.C. § 1292(b)

(a) Petition for Permission to Appeal. An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating there-

to. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Grant of Permission; Cost Bond; Filing of Record. Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is derived in the main from Third Circuit Rule 11(2), which is similar to the rule governing appeals under 28 U.S.C. § 1292(b) in a majority of the circuits. The second sentence of subdivision (a) resolves a conflict over the question of whether the district court can amend an order by supplying the statement required by § 1292(b) at any time after entry of the order, with the result that the time fixed by the statute commences to run on the date of entry of the order as amended. Compare *Milbert* v. *Bison Laboratories*, 260 F.2d 431 (3d Cir., 1958) with *Sperry Rand Corporation* v. *Bell Telephone Laboratories*, 272 F.2d (2d Cir., 1959), *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697 (5th Cir., 1961), and *Houston Fearless Corporation* v. *Teter*, 313 F.2d 91 (10th Cir., 1962). The view taken by the Second, Fifth and Tenth Circuits seems theoretically and practically sound, and the rule adopts it. Although a majority of the circuits now require the filing of a notice of appeal following the grant of permission to appeal, filing of the notice serves no function other than to provide a time from which the time for transmitting the record and docketing the appeal begins to run.

1979 AMENDMENT

The proposed amendment adapts to the practice in appeals from interlocutory orders under 28 U.S.C. § 1292(b) the provisions of proposed Rule 3(e) above, requiring payment of all fees in the district court upon the filing of the notice of appeal. See Note to proposed amended Rule 3(e), *supra*.

Rule 6. Appeals by Allowance in Bankruptcy Proceedings

(a) Petition for Allowance. Allowance of an appeal under section 24 of the Bankruptcy Act (11 U.S.C. § 47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U.S.C. § 650, § 898) shall be sought by filing a petition for allowance with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed.

(b) Content of Petition; Answer. The petition shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and of any opinion or memorandum relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The petition and answer shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Allowance of the Appeal; Fees; Cost Bond; Filing of Record. Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

References in Text

The Bankruptcy Act, referred to in subd. (a), is Act July 1, 1898, c. 541, 30 Stat. 544, as amended. Sections 24, 250, and 498 of the Bankruptcy Act were classified to sections 47, 650, and 898, respectively, of former Title 11, prior to the repeal of the Bankruptcy Act by Pub.L. 95–598, Title IV, § 401(a), Nov. 6, 1978, 92 Stat. 2682.

Bankruptcy Reform Act of 1978

Selected provisions, see Pub.L. 95–598, Title II, §§ 201–252, Title IV, §§ 401–411, Nov. 6, 1978, 92 Stat. 2657–2673, 92 Stat. 2657–2673, 2682–2688.

Courts During Transition

For provisions relating to courts of bankruptcy during transition period, see Pub.L. 95–598, Title IV, § 404, Nov. 6, 1978, 92 Stat. 2683.

Jurisdiction and Procedure During Transition

For provisions relating to jurisdiction and procedure of bankruptcy appeals during transition period, see Pub.L. 95–598, Title IV, § 405, Nov. 6, 1978, 92 Stat. 2685.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is substantially a restatement of present procedure. See D.C. Cir. Rule 34; 6th Cir. Rule 11; 7th Cir. Rule 10(d); 10th Cir. Rule 13.

Present circuit rules commonly provide that the petition for allowance of an appeal shall be filed within the time allowed by Section 25 of the Bankruptcy Act for taking appeals of right. For the reasons explained in the Note accompanying Rule 4, that rule makes the time for appeal in bankruptcy cases the same as that which obtains in other civil cases and thus supersedes Section 25. Thus the present rule simply continues the former practice of making the time for filing the petition in appeals by allowance the same as that provided for filing the notice of appeal in appeals of right.

1979 AMENDMENT

The proposed amendment adapts to the practice in appeals by allowance in bankruptcy proceedings the provisions of proposed Rule 3(e) above, requiring payment of all fees in the district court at the time of the filing of the notice of appeal. See Note to Rule 3(e), supra.

Rule 7. Bond for Costs on Appeal in Civil Cases

The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is derived from FRCP 73(c) without change in substance.

1979 AMENDMENT

The amendment would eliminate the provision of the present rule that requires the appellant to file a $250 bond for costs on appeal at the time of filing his notice of appeal. The $250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

Rule 8. Stay or Injunction Pending Appeal

(a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

(b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties. Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

(c) Stays in Criminal Cases. Stays in criminal cases shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). While the power of a court of appeals to stay proceedings in the district court during the

pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the all writs statute, 28 U.S.C. § 1651. *Eastern Greyhound Lines* v. *Fusco*, 310 F.2d 632 (6th Cir., 1962); *United States* v. *Lynd*, 301 F.2d 818 (5th Cir., 1962); *Public Utilities Commission of Dist. of Col.* v. *Capital Transit Co.*, 94 U.S.App.D.C. 140, 214 F.2d 242 (1954). And the Supreme Court has termed the power "inherent" (*In re McKenzie*, 180 U.S. 536, 551, 21 S.Ct. 468, 45 L.Ed. 657 (1901)) and "part of its (the court of appeals) traditional equipment for the administration of justice." (*Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 9–10, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)). The power of a single judge of the court of appeals to grant a stay pending appeal was recognized in *In re McKenzie, supra. Alexander* v. *United States*, 173 F.2d 865 (9th Cir., 1949) held that a single judge could not stay the judgment of a district court, but it noted the absence of a rule of court authorizing the practice. FRCP 62(g) adverts to the grant of a stay by a single judge of the appellate court. The requirement that application be first made to the district court is the case law rule. *Cumberland Tel. & Tel. Co.* v. *Louisiana Public Service Commission*, 260 U.S. 212, 219, 43 S.Ct. 75, 67 L.Ed. 217 (1922); *United States* v. *El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir., 1951); *United States* v. *Hansell*, 109 F.2d 613 (2d Cir., 1940). The requirement is explicitly stated in FRCrP 38(c) and in the rules of the First, Third, Fourth and Tenth Circuits. See also Supreme Court Rules 18 and 27.

The statement of the requirement in the proposed rule would work a minor change in present practice. FRCP 73(e) requires that if a bond for costs on appeal or a supersedeas bond is offered after the appeal is docketed, leave to file the bond must be obtained from the court of appeals. There appears to be no reason why matters relating to supersedeas and cost bonds should not be initially presented to the district court whenever they arise prior to the disposition of the appeal. The requirement of FRCP 73(e) appears to be a concession to the view that once an appeal is perfected, the district court loses all power over its judgment. See *In re Federal Facilities Trust*, 227 F.2d 651 (7th Cir., 1955) and cases—cited at 654–655. No reason appears why all questions related to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court in the ordinary case.

Subdivision (b). The provisions respecting a surety upon a bond or other undertaking are based upon FRCP 65.1.

Rule 9. Release in Criminal Cases

(a) Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction. An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.

(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.

(c) Criteria for Release. The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § 3143. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community and that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or in an order for a new trial rests with the defendant.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Pub.L. 98–473, Title II, § 210, Oct. 12, 1984, 98 Stat. 1987.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

1967 NOTE

Subdivision (a). The appealability of release orders entered prior to a judgment of conviction is determined by the provisions of 18 U.S.C. § 3147, as qualified by 18 U.S.C. § 3148, and by the rule announced in *Stack* v. *Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), holding certain orders respecting release appealable as final orders under 28 U.S.C. § 1291. The language of the rule, "(a)n appeal authorized by law from an order refusing or imposing conditions of release," is intentionally broader than that used in 18 U.S.C. § 3147 in describing orders made appealable by that section. The summary procedure ordained by the rule is intended to apply to all appeals from orders respecting release, and it would appear that at least some orders not made appealable by 18 U.S.C. § 3147 are nevertheless appealable under the *Stack* v. *Boyle* rationale. See, for example, *United States* v. *Foster*, 278 F.2d 567 (2d Cir., 1960), holding appealable an order refusing to extend bail limits. Note also the provisions of 18 U.S.C. § 3148, which after withdrawing from persons charged with an offense punishable by death and from those who have been convicted of an offense the right of appeal granted by 18 U.S.C. § 3147, expressly preserves "other rights to judicial review of conditions of release or orders of detention."

The purpose of the subdivision is to insure the expeditious determination of appeals respecting release orders, an expedition commanded by 18 U.S.C. § 3147 and by the

Court in *Stack* v. *Boyle*, supra. It permits such appeals to be heard on an informal record without the necessity of briefs and on reasonable notice. Equally important to the just and speedy disposition of these appeals is the requirement that the district court state the reasons for its decision. See *Jones* v. *United States*, 358 F.2d 543 (D.C. Cir., 1966); *Rhodes* v. *United States*, 275 F.2d 78 (4th Cir., 1960); *United States* v. *Williams*, 253 F.2d 144 (7th Cir., 1958).

Subdivision (b). This subdivision regulates procedure for review of an order respecting release at a time when the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction. Notwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. § 3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court. But at this point there is obviously no need for a separate appeal from the order of the district court respecting release. The court of appeals or a judge thereof has power to effect release on motion as an incident to the pending appeal. See FRCrP 38(c) and 46(a)(2). But the motion is functionally identical with the appeal regulated by subdivision (a) and requires the same speedy determination if relief is to be effective. Hence the similarity of the procedure outlined in the two subdivisions.

1972 NOTE

Subdivision (c) is intended to bring the rule into conformity with 18 U.S.C. § 3148 and to allocate to the defendant the burden of establishing that he will not flee and that he poses no danger to any other person or to the community. The burden is placed upon the defendant in the view that the fact of his conviction justifies retention in custody in situations where doubt exists as to whether he can be safely released pending disposition of his appeal. Release pending appeal may also be denied if "it appears that an appeal is frivolous or taken for delay." 18 U.S.C. § 3148. The burden of establishing the existence of these criteria remains with the government.

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered.

(1) Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the

court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

REFERENCES IN TEXT. The Criminal Justice Act, referred to in subd. (b)(1), probably means the Criminal Justice Act of 1964, Pub.L. 88-455, Aug. 20, 1964, 78 Stat. 552, which is classified to section 3006A of Title 18, U.S.C.A., Crimes and Criminal Procedure set out post in this pamphlet.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is derived from FRCP 75(a), (b), (c) and (d) and FRCP 76, without change in substance.

1979 AMENDMENT

The proposed amendments to Rule 10(b) would require the appellant to place with the reporter a written order for the transcript of proceedings and file a copy with the clerk, and to indicate on the order if the transcript is to be provided under the Criminal Justice Act. If the appellant does not plan to order a transcript of any of the proceedings, he must file a certificate to that effect. These requirements make the appellant's steps in readying the appeal a matter of record and give the district court notice of requests for transcripts at the expense of the United States under the Criminal Justice Act. They are also the third step in giving the court of appeals some control over the production and transmission of the record. See Note to Rules 3(d)(e) above and Rule 11 below.

In the event the appellant orders no transcript, or orders a transcript of less than all the proceedings, the procedure under the proposed amended rule remains substantially as before. The appellant must serve on the appellee a copy of his order or in the event no order is placed, of the certificate to that effect, and a statement of the issues he intends to present on appeal, and the appellee may thereupon designate additional parts of the transcript to be included, and upon appellant's refusal to order the additional parts, may either order them himself or seek an order requiring the appellant to order them. The only change proposed in this procedure is to place a 10 day time limit on motions to require the appellant to order the additional portions.

Rule 10(b) is made subject to local rules of the courts of appeals in recognition of the practice in some circuits in some classes of cases, e.g., appeals by indigents in criminal cases after a short trial, of ordering immediate preparation of a complete transcript, thus making compliance with the rule unnecessary.

Rule 11. Transmission of the Record

(a) Duty of Appellant. After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(b) Duty of Reporter to Prepare and File Transcript; Notice to Court of Appeals; Duty of Clerk to Transmit the Record. Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that he has received it and the date on which he expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that he has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designated by local rule, shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers. Notwithstanding the provisions of (a) and (b) of this Rule 11, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event the clerk of the district court shall certify to the clerk of the court of appeals that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(d) [Extension of Time for Transmission of the Record; Reduction of Time.] [Abrogated.]

(e) Retention of the Record in the District Court by Order of Court. The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

(f) Stipulation of Parties that Parts of the Record be Retained in the District Court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Court of Appeals. If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivisions (a) and (b). These subdivisions are derived from FRCP 73(g) and FRCP 75(e). FRCP 75(e) presently directs the clerk of the district court to transmit the record within the time allowed or fixed for its filing, which, under the provisions of FRCP 73(g) is within 40 days from the date of filing the notice of appeal, unless an extension is obtained from the district court. The precise time at which the record must be transmitted thus depends upon the time required for delivery of the record from the district court to the court of appeals, since, to permit its timely filing, it must reach the court of appeals before expiration of the 40-day period of an extension thereof. Subdivision (a) of this rule provides that the record is to be transmitted within the 40-day period, or any extension thereof; subdivision (b) provides that transmission is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals; Rule 12(b) directs the clerk of the court of appeals to file the record upon its receipt following timely docketing and transmittal. It can thus be determined with certainty precisely when the clerk of the district court must forward the record to the clerk of the court of appeals in order to effect timely filing: the final day of the 40-day period or of any extension thereof.

Subdivision (c). This subdivision is derived from FRCP 75(e) without change of substance.

Subdivision (d). This subdivision is derived from FRCP 73(g) and FRCrP 39(c). Under present rules the district court is empowered to extend the time for filing the record and docketing the appeal. Since under the proposed rule timely transmission now insures timely filing (see note to subdivisions (a) and (b) above) the power of the district court is expressed in terms of its power to extend the time for transmitting the record. Restriction of that power to a period of 90 days after the filing of the notice of appeal represents a change in the rule with respect to appeals in criminal cases. FRCrP 39(c) now permits the district court to extend the time for filing and docketing without restriction. No good reason appears for a difference between the civil and criminal rule in this regard, and subdivision (d) limits the power of the district court to extend the time for transmitting the record in all cases to 90 days from the date of filing the notice of appeal, just as its power is now limited with respect to docketing and filing in civil cases. Subdivision (d) makes explicit the power of the court of appeals to permit the record to be filed at any time. See *Pyramid Motor Freight Corporation* v. *Ispass*, 330 U.S. 695, 67 S.Ct. 954, 91 L.Ed. 1184 (1947).

Subdivisions (e), (f) and (g). These subdivisions are derived from FRCP 75(f), (a) and (g), respectively, without change of substance.

1979 AMENDMENT

Under present Rule 11(a) it is provided that the record shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal. Under present Rule 11(d) the district court, on request made during the initial time or any extension thereof, and cause shown, may extend the time for the transmission of the record to a point not more than 90 days after the filing of

the first notice of appeal. If the district court is without authority to grant a request to extend the time, or denies a request for extension, the appellant may make a motion for extension of time in the court of appeals. Thus the duty to see that the record is transmitted is placed on the appellant. Aside from ordering the transcript within the time prescribed the appellant has no control over the time at which the record is transmitted, since all steps beyond this point are in the hands of the reporter and the clerk. The proposed amendments recognize this fact and place the duty directly on the reporter and the clerk. After receiving the written order for the transcript (See Note to Rule 10(b) above), the reporter must acknowledge its receipt, indicate when he expects to have it completed, and mail the order so endorsed to the clerk of the court of appeals. Requests for extensions of time must be made by the reporter to the clerk of the court of appeals and action on such requests is entered on the docket. Thus from the point at which the transcript is ordered the clerk of the court of appeals is made aware of any delays. If the transcript is not filed on time, the clerk of the court of appeals will notify the district judge.

Present Rule 11(b) provides that the record shall be transmitted when it is "complete for the purposes of the appeal." The proposed amended rule continues this requirement. The record is complete for the purposes of the appeal when it contains the original papers on file in the clerk's office, all necessary exhibits, and the transcript, if one is to be included. Cf. present Rule 11(c). The original papers will be in the custody of the clerk of the district court at the time the notice of appeal is filed. See Rule 5(e) of the F.R.C.P. The custody of exhibits is often the subject of local rules. Some of them require that documentary exhibits must be deposited with the clerk. See Local Rule 13 of the Eastern District of Virginia. Others leave exhibits with counsel, subject to order of the court. See Local Rule 33 of the Northern District of Illinois. If under local rules the custody of exhibits is left with counsel, the district court should make adequate provision for their preservation during the time during which an appeal may be taken, the prompt deposit with the clerk of such as under Rule 11(b) are to be transmitted to the court of appeals, and the availability of others in the event that the court of appeals should require their transmission. Cf. Local Rule 11 of the Second Circuit.

Usually the record will be complete with the filing of the transcript. While the proposed amendment requires transmission "forthwith" when the record is complete, it was not designed to preclude a local requirement by the court of appeals that the original papers and exhibits be transmitted when complete without awaiting the filing of the transcript.

The proposed amendments continue the provision in the present rule that documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted without direction by the parties or by the court of appeals, and the requirement that the parties make special arrangements for transmission and receipt of exhibits of unusual bulk or weight. In addition, they give recognition to local rules that make transmission of other record items subject to order of the court of appeals. See Local Rule 4 of the Seventh Circuit.

Rule 12. Docketing the Appeal; Filing of the Record

(a) Docketing the Appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) [Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal] [Abrogated]

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). All that is involved in the docketing of an appeal is the payment of the docket fee. In practice, after the clerk of the court of appeals receives the record from the clerk of the district court he notifies the appellant of its receipt and requests payment of the fee. Upon receipt of the fee, the clerk enters the appeal upon the docket and files the record. The appellant is allowed to pay the fee at any time within the time allowed or fixed for transmission of the record and thereby to discharge his responsibility for docketing. The final sentence is added in the interest of facilitating future reference and citation and location of cases in indexes. Compare 3d Cir. Rule 10(2); 4th Cir. Rule 9(8); 6th Cir. Rule 14(1).

Subdivision (c). The rules of the circuits generally permit the appellee to move for dismissal in the event the appellant fails to effect timely filing of the record. See 1st Cir. Rule 21(3); 3d Cir. Rule 21(4); 5th Cir. Rule 16(1); 8th Cir. Rule 7(d).

1979 AMENDMENT

Note to Subdivision (a). Under present Rule 12(a) the appellant must pay the docket fee within the time fixed for the transmission of the record, and upon timely payment of the fee, the appeal is docketed. The proposed amendment takes the docketing out of the hands of the appellant. The fee is paid at the time the notice of appeal is filed and the appeal is entered on the docket upon receipt of a copy of the notice of appeal and of the docket entries, which are sent to the court of appeals under the provisions of Rule 3(d). This is designed to give the court of appeals control of its docket at the earliest possible time so that within the limits of its facilities and person-

nel it can screen cases for appropriately different treatment, expedite the proceedings through prehearing conferences or otherwise, and in general plan more effectively for the prompt disposition of cases.

Note to Subdivision (b). The proposed amendment conforms the provision to the changes in Rule 11.

TITLE III. REVIEW OF DECISIONS OF THE UNITED STATES TAX COURT

Rule 13. Review of Decisions of the Tax Court

(a) How Obtained; Time for Filing Notice of Appeal. Review of a decision of the United States Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later.

(b) Notice of Appeal—How Filed. The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.

(c) Content of the Notice of Appeal; Service of the Notice; Effect of Filing and Service of the Notice. The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.

(d) The Record on Appeal; Transmission of the Record; Filing of the Record. The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court, respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). This subdivision effects two changes in practice respecting review of Tax Court decisions: (1) Section 7483 of the Internal Revenue Code, 68A Stat. 891, 26 U.S.C. § 7483, provides that review of a Tax Court decision may be obtained by filing a petition for review. The subdivision provides for review by the filing of the simple and familiar notice of appeal used to obtain review of district court judgments; (2) Section 7483, *supra*, requires that a petition for review be filed within 3 months after a decision is rendered, and provides that if a petition is so filed by one party, any other party may file a petition for review within 4 months after the decision is rendered. In the interest of fixing the time for review with precision, the proposed rule substitutes "90 days" and "120 days" for the statutory "3 months" and "4 months", respectively. The power of the Court to regulate these details of practice is clear. Title 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)), authorizes the Court to regulate ". . . practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States. . . ."

The second paragraph states the settled teaching of the case law. See *Robert Louis Stevenson Apartments, Inc.* v. *C.I.R.*, 337 F.2d 681, 10 A.L.R.3d 112 (8th Cir., 1964); *Denholm & McKay Co.* v. *C.I.R.*, 132 F.2d 243 (1st Cir., 1942); *Helvering* v. *Continental Oil Co.*, 63 App.D.C. 5, 68 F.2d 750 (1934); *Burnet* v. *Lexington Ice & Coal Co.*, 62 F.2d 906 (4th Cir., 1933); *Griffiths* v. *C.I.R.*, 50 F.2d 782 (7th Cir., 1931).

Subdivision (b). The subdivision incorporates the statutory provision (Title 26, U.S.C. § 7502) that timely mailing is to be treated as timely filing. The statute contains special provisions respecting other than ordinary mailing. If the notice of appeal is sent by registered mail, registration is deemed prima facie evidence that the notice was delivered to the clerk of the Tax Court, and the date of registration is deemed the postmark date. If the notice of appeal is sent by certified mail, the effect of certification with respect to prima facie evidence of delivery and the postmark date depends upon regulations of the Secretary of the Treasury. The effect of a postmark made other than by the United States Post Office likewise

depends upon regulations of the Secretary. Current regulations are found in 26 CFR § 301.7502–1.

1979 AMENDMENT

The proposed amendment reflects the change in the title of the Tax Court to "United States Tax Court." See 26 U.S.C. § 7441.

Rule 14. Applicability of other Rules to Review of Decisions of the Tax Court

All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4–9, Rules 15–20, and Rules 22 and 23 are not applicable.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The proposed rule continues the present uniform practice of the circuits of regulating review of decisions of the Tax Court by the general rules applicable to appeals from judgments of the district courts.

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

Rule 15. Review or Enforcement of Agency Orders—How Obtained; Intervention

(a) Petition for Review of Order; Joint Petition. Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) Application for Enforcement of Order; Answer; Default; Cross-Application for Enforcement. An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(c) Service of Petition or Application. A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(d) Intervention. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

General Note. The power of the Supreme Court to prescribe rules of practice and procedure for the judicial review or enforcement of orders of administrative agen-

cies, boards, commissions, and officers is conferred by 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, § 1, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)). Section 11 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1132, reenacted as 28 U.S.C. § 2352 (28 U.S.C.A. § 2352 (Suppl. 1966)), repealed by the Act of November 6, 1966, § 4, supra, directed the courts of appeals to adopt and promulgate, subject to approval by the Judicial Conference rules governing practice and procedure in proceedings to review the orders of boards, commissions and officers whose orders were made reviewable in the courts of appeals by the Act. Thereafter, the Judicial Conference approved a uniform rule, and that rule, with minor variations, is now in effect in all circuits. Third Circuit Rule 18 is a typical circuit rule, and for convenience it is referred to as the uniform rule in the notes which accompany rules under this Title.

Subdivision (a). The uniform rule (see General Note above) requires that the petition for review contain "a concise statement, in barest outline, of the nature of the proceedings as to which relief is sought, the facts upon which venue is based, the grounds upon which relief is sought, and the relief prayed." That language is derived from Section 4 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1130, reenacted as 28 U.S.C. § 2344 (28 U.S.C.A. § 2344 (Suppl. 1966)). A few other statutes also prescribe the content of the petition, but the great majority are silent on the point. The proposed rule supersedes 28 U.S.C. § 2344 and other statutory provisions prescribing the form of the petition for review and permits review to be initiated by the filing of a simple petition similar in form to the notice of appeal used in appeals from judgments of district courts. The more elaborate form of petition for review now required is rarely useful either to the litigants or to the courts. There is no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the briefs. Other provisions of this subdivision are derived from sections 1 and 2 of the uniform rule.

Subdivision (b). This subdivision is derived from sections 3, 4 and 5 of the uniform rule.

Subdivision (c). This subdivision is derived from section 1 of the uniform rule.

Subdivision (d). This subdivision is based upon section 6 of the uniform rule. Statutes occasionally permit intervention by the filing of a notice of intention to intervene. The uniform rule does not fix a time limit for intervention, and the only time limits fixed by statute are the 30-day periods found in the Communications Act Amendments, 1952, § 402(e), 66 Stat. 719, 47 U.S.C. § 402(e), and the Sugar Act of 1948, § 205(d), 61 Stat. 927, 7 U.S.C. § 1115(d).

Rule 16. The Record on Review or Enforcement

(a) Composition of the Record. The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

(b) Omissions from or Misstatements in the Record. If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a) is based upon 28 U.S.C. § 2112(b). There is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same. The record in agency cases is thus the same as that in appeals from the district court—the original papers, transcripts and exhibits in the proceeding below. Subdivision (b) is based upon section 8 of the uniform rule (see General Note following Rule 15).

Rule 17. Filing of the Record

(a) Agency to File; Time for Filing; Notice of Filing. The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

(b) Filing—What Constitutes. The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted

to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). This subdivision is based upon section 7 of the uniform rule (see General Note following Rule 15). That rule does not prescribe a time for filing the record in enforcement cases. Forty days are allowed in order to avoid useless preparation of the record or certified list in cases where the application for enforcement is not contested.

Subdivision (b). This subdivision is based upon 28 U.S.C. § 2112 and section 7 of the uniform rule. It permits the agency to file either the record itself or a certified list of its contents. It also permits the parties to stipulate against transmission of designated parts of the record without the fear that an inadvertent stipulation may "diminish" the record. Finally, the parties may, in cases where consultation of the record is unnecessary, stipulate that neither the record nor a certified list of its contents be filed.

Rule 18. Stay Pending Review

Application for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the applicant had requested. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

While this rule has no counterpart in present rules regulating review of agency proceedings, it merely assimilates the procedure for obtaining stays in agency proceedings with that for obtaining stays in appeals from the district courts. The same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review. See Note accompanying Rule 8. Title 5, U.S.C. § 705 (5 U.S.C.A. § 705 (1966 Pamphlet)) confers general authority on both agencies and reviewing courts to stay agency action pending review. Many of the statutes authorizing review of agency action by the courts of appeals deal with the question of stays, and at least one, the Act of June 15, 1936, 49 Stat. 1499 (7 U.S.C. § 10a), prohibits a stay pending review. The proposed rule in nowise affects such statutory provisions respecting stays. By its terms, it simply indicates the procedure to be followed when a stay is sought.

Rule 19. Settlement of Judgments Enforcing Orders

When an opinion of the court is filed directing the entry of a judgment enforcing in whole or in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, he shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which he deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This is section 12 of the uniform rule (see General Note following Rule 15) with changes in phraseology.

Rule 20. Applicability of other Rules to Review or Enforcement of Agency Orders

All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3–14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The proposed rule continues the present uniform practice of the circuits of regulating agency review or enforcement proceedings by the general rules applicable to appeals from judgments of the district courts.

TITLE V. EXTRAORDINARY WRITS

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and other Extraordinary Writs

(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

(c) Other Extraordinary Writs. Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) Form of Papers; Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. § 1651. Subdivisions (a) and (b) regulate in detail the procedure surrounding the writs most commonly sought—mandamus or prohibition directed to a judge or judges. Those subdivisions are based upon Supreme Court Rule 31, with certain changes which reflect the uniform practice among the circuits (Seventh Circuit Rule 19 is a typical circuit rule). Subdivision (c) sets out a very general procedure to be followed in applications for the variety of other writs which may be issued under the authority of 28 U.S.C. § 1651.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

Rule 22. Habeas Corpus Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of

appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). Title 28 U.S.C. § 2241(a) authorizes circuit judges to issue the writ of habeas corpus. Section 2241(b), however, authorizes a circuit judge to decline to entertain an application and to transfer it to the appropriate district court, and this is the usual practice. The first two sentences merely make present practice explicit. Title 28 U.S.C. § 2253 seems clearly to contemplate that once an application is presented to a district judge and is denied by him, the remedy is an appeal from the order of denial. But the language of 28 U.S.C. § 2241 seems to authorize a second original application to a circuit judge following a denial by a district judge. *In re Gersing*, 79 U.S.App.D.C. 245, 145 F.2d 481 (D.C. Cir., 1944) and *Chapman* v. *Teets*, 241 F.2d 186 (9th Cir., 1957) acknowledge the availability of such a procedure. But the procedure is ordinarily a waste of time for all involved, and the final sentence attempts to discourage it.

A court of appeals has no jurisdiction as a court to grant an original writ of habeas corpus, and courts of appeals have dismissed applications addressed to them. *Loum* v. *Alvis*, 263 F.2d 836 (6th Cir., 1959); *In re Berry*, 221 F.2d 798 (9th Cir., 1955); *Posey* v. *Dowd*, 134 F.2d 613 (7th Cir., 1943). The fairer and more expeditious practice is for the court of appeals to regard an application addressed to it as being addressed to one of its members, and to transfer the application to the appropriate district court in accordance with the provisions of this rule. Perhaps such a disposition is required by the rationale of *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956).

Subdivision (b). Title 28 U.S.C. § 2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

While 28 U.S.C. § 2253 does not authorize the court of appeals as a court to grant a certificate of probable cause, *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956) makes it clear that a court of appeals may not decline to consider a request for the certificate addressed to it as a court but must regard the request as made to the judges thereof. The fourth sentence incorporates the Burwell rule.

Although 28 U.S.C. § 2253 appears to require a certificate of probable cause even when an appeal is taken by a state or its representative, the legislative history strongly suggests that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ. See *United States ex rel. Tillery* v. *Cavell*, 294 F.2d 12 (3d Cir., 1960). Four of the five circuits which have ruled on the point have so interpreted section 2253. *United States ex rel. Tillery* v. *Cavell*, supra; *Buder* v. *Bell*, 306 F.2d 71 (6th Cir., 1962); *United States ex rel. Calhoun* v. *Pate*, 341 F.2d 885 (7th Cir., 1965); *State of Texas* v. *Graves*, 352 F.2d 514 (5th Cir., 1965). Cf. *United States ex rel. Carrol* v. *La Vallee*, 342 F.2d 641 (2d Cir., 1965). The final sentence makes it clear that a certificate of probable cause is not required of a state or its representative.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

(b) Detention or Release of Prisoner Pending Review of Decision Failing to Release. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

(c) Release of Prisoner Pending Review of Decision Ordering Release. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

(d) Modification of Initial Order Respecting Custody. An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967 [see 1980 Revised Supreme Court Rule 41, effective June 30, 1980].

Rule 24. Proceedings in Forma Pauperis

(a) Leave to Proceed on Appeal in Forma Pauperis from District Court to Court of Appeals. A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

(b) Leave to Proceed on Appeal or Review in Forma Pauperis in Administrative Agency Proceedings. A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.

(c) Form of Briefs, Appendices and Other Papers. Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). Authority to allow prosecution of an appeal in forma pauperis is vested in "[a]ny court of the United States" by 28 U.S.C. § 1915(a). The second paragraph of section 1915(a) seems to contemplate initial application to the district court for permission to proceed in forma pauperis, and although the circuit rules are generally silent on the question, the case law requires initial application to the district court. *Hayes* v. *United States*, 258 F.2d 400 (5th Cir., 1958), *cert. den.* 358 U.S. 856, 79 S.Ct. 87, 3 L.Ed.2d 89 (1958); *Elkins* v. *United States*, 250 F.2d 145 (9th Cir., 1957) see 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States* v. *Farley*, 238 F.2d 575 (2d Cir., 1956) see 354 U.S. 521, 77 S.Ct. 1371, 1 L.Ed.2d 1529 (1957). D.C. Cir. Rule 41(a) requires initial application to the district court. The content of the affidavit follows the language of the statute; the requirement of a statement of the issues comprehends the statutory requirement of a statement of "the nature of the . . . appeal. . . ." The second sentence is in accord with the decision in *McGann* v. *United States*, 362 U.S. 309, 80 S.Ct. 725, 4 L.Ed.2d 734 (1960). The requirement contained in the third sentence has no counterpart in present circuit rules, but it has been imposed by decision in at least two circuits. *Ragan* v. *Cox*, 305 F.2d 58 (10th Cir., 1962); *United States ex rel. Breedlove* v. *Dowd*, 269 F.2d 693 (7th Cir., 1959).

The second paragraph permits one whose indigency has been previously determined by the district court to proceed on appeal in forma pauperis without the necessity of a redetermination of indigency, while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith, 28 U.S.C. § 1915(a), and permitting an inquiry into whether the circumstances of the party who was originally entitled to proceed in forma pauperis have changed during the course of the litigation. Cf. Sixth Circuit Rule 26.

The final paragraph establishes a subsequent motion in the court of appeals, rather than an appeal from the order of denial or from the certification of lack of good faith, as the proper procedure for calling in question the correctness of the action of the district court. The simple and expeditious motion procedure seems clearly preferable to an appeal. This paragraph applies only to applications for leave to appeal in forma pauperis. The order of a

district court refusing leave to initiate an action in the district court in forma pauperis is reviewable on appeal. See *Roberts* v. *United States District Court*, 339 U.S. 844, 70 S.Ct. 954, 94 L.Ed. 1326 (1950).

Subdivision (b). Authority to allow prosecution in forma pauperis is vested only in a "court of the United States" (see Note to subdivision (a), above). Thus in proceedings brought directly in a court of appeals to review decisions of agencies or of the Tax Court, authority to proceed in forma pauperis should be sought in the court of appeals. If initial review of agency action is had in a district court, an application to appeal to a court of appeals in forma pauperis from the judgment of the district court is governed by the provisions of subdivision (a).

1979 AMENDMENT

The proposed amendment reflects the change in the title of the Tax Court to "United States Tax Court." See 26 U.S.C. § 7441.

TITLE VII. GENERAL PROVISIONS

Rule 25. Filing and Service

(a) Filing. Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the date of filing and shall thereafter transmit it to the clerk.

(b) Service of all Papers Required. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of Service. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The rule that filing is not timely unless the papers filed are received within the time allowed is the familiar one. *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir., 1959), rev'd on other grounds 362 U.S. 396, 80 S.Ct. 789, 4 L.Ed.2d 820 (1960); *Kahler-Ellis Co.* v. *Ohio Turnpike Commission*, 225 F.2d 922 (6th Cir., 1955). An exception is made in the case of briefs and appendices in order to afford the parties the maximum time for their preparation. By the terms of the exception, air mail delivery must be used whenever it is the most expeditious manner of delivery.

A majority of the circuits now require service of all papers filed with the clerk. The usual provision in present rules is for service on "adverse" parties. In view of the extreme simplicity of service by mail, there seems to be no reason why a party who files a paper should not be required to serve all parties to the proceeding in the court of appeals, whether or not they may be deemed adverse. The common requirement of proof of service is retained, but the rule permits it to be made by simple certification, which may be endorsed on the copy which is filed.

Rule 26. Computation and Extension of Time

(a) Computation of Time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the princi-

pal office of the clerk of the court of appeals in which the appeal is pending is located.

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

(c) Additional Time after Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

(As amended Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

1967 NOTE

The provisions of this rule are based upon FRCP 6(a), (b) and (e). See also Supreme Court Rule 34 and FRCrP 45. Unlike FRCP 6(b), this rule, read with Rule 27, requires that every request for enlargement of time be made by motion, with proof of service on all parties. This is the simplest, most convenient way of keeping all parties advised of developments. By the terms of Rule 27(b) a motion for enlargement of time under Rule 26(b) may be entertained and acted upon immediately, subject to the right of any party to seek reconsideration. Thus the requirement of motion and notice will not delay the granting of relief of a kind which a court is inclined to grant as of course. Specifically, if a court is of the view that an extension of time sought before expiration of the period originally prescribed or as extended by a previous order ought to be granted in effect ex parte, as FRCP 6(b) permits, it may grant motions seeking such relief without delay.

1971 NOTE

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C. § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

Rule 27. Motions

(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.

(c) Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) Form of Papers; Number of Copies. All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivisions (a) and (b). Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course. The provision of subdivision (a) which permits any party to file a response in opposition to a

motion within 7 days after its service upon him assumes that the motion is one of substance which ought not be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. Motions authorized by Rules 8, 9, 18 and 41 are likewise motions of substance; but in the nature of the relief sought, to afford an adversary an automatic delay of at least 7 days is undesirable, thus such motions may be acted upon after notice which is reasonable under the circumstances.

The term "motions for procedural orders" is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response, subject to the right of any party who is adversely affected by the action to seek reconsideration.

Subdivision (c). Within the general consideration of procedure on motions is the problem of the power of a single circuit judge. Certain powers are granted to a single judge of a court of appeals by statute. Thus, under 28 U.S.C. § 2101(f) a single judge may stay execution and enforcement of a judgment to enable a party aggrieved to obtain certiorari; under 28 U.S.C. § 2251 a judge before whom a habeas corpus proceeding involving a person detained by state authority is pending may stay any proceeding against the person; under 28 U.S.C. § 2253 a single judge may issue a certificate of probable cause. In addition, certain of these rules expressly grant power to a single judge. See Rules 8, 9 and 18.

This subdivision empowers a single circuit judge to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms he may entertain and act upon any motion other than a motion to dismiss or otherwise determine an appeal or other proceeding. But the relief sought must be "relief which under these rules may properly be sought by motion."

Examples of the power conferred on a single judge by this subdivision are: to extend the time for transmitting the record or docketing the appeal (Rules 11 and 12); to permit intervention in agency cases (Rule 15), or substitution in any case (Rule 43); to permit an appeal in forma pauperis (Rule 24); to enlarge any time period fixed by the rules other than that for initiating a proceeding in the court of appeals (Rule 26(b)); to permit the filing of a brief by amicus curiae (Rule 29); to authorize the filing of a deferred appendix (Rule 30(c)), or dispense with the requirement of an appendix in a specific case (Rule 30(f)), or permit carbon copies of briefs or appendices to be used (Rule 32(a)); to permit the filing of additional briefs (Rule 28(c)), or the filing of briefs of extraordinary length (Rule 28(g)); to postpone oral argument (Rule 34(a)), or grant additional time therefor (Rule 34(b)).

Certain rules require that application for the relief or orders which they authorize be made by petition. Since relief under those rules may not properly be sought by motion, a single judge may not entertain requests for such relief. Thus a single judge may not act upon requests for permission to appeal (see Rules 5 and 6); or for mandamus or other extraordinary writs (see Rule 21), other than for stays or injunctions *pendente lite*, authority to grant which is "expressly conferred by these rules" on a single judge under certain circumstances (see Rules 8 and 18); or upon petitions for rehearing (see Rule 40).

A court of appeals may by order or rule abridge the power of a single judge if it is of the view that a motion or a class of motions should be disposed of by a panel. Exercise of any power granted a single judge is discretionary with the judge. The final sentence in this subdivision makes the disposition of any matter by a single judge subject to review by the court.

1979 AMENDMENT

The proposed amendment would give sanction to local rules in a number of circuits permitting the clerk to dispose of specified types of procedural motions.

Rule 28. Briefs

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(1)–(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) Reply Brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court.

(d) References in Briefs to Parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It pro-

motes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

(e) References in Briefs to the Record. References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, Etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) Length of Briefs. Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc.

(h) Briefs in Cases Involving Cross Appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

(i) Briefs in Cases Involving Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is based upon Supreme Court Rule 40. For variations in present circuit rules on briefs see 2d Cir. Rule 17, 3d Cir. Rule 24, 5th Cir. Rule 24, and 7th Cir. Rule 17. All circuits now limit the number of pages of briefs, a majority limiting the brief to 50 pages of standard typographic printing. Fifty pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text, given the page sizes required by Rule 32 and the requirement set out there that text produced by a method other than standard typographic must be double spaced.

1979 AMENDMENT

Note to Subdivision (g). The proposed amendment eliminates the distinction appearing in the present rule between the permissible length in pages of printed and typewritten briefs, investigation of the matter having disclosed that the number of words on the printed page is little if any larger than the number on a page typed in standard elite type.

The provision is made subject to local rule to permit the court of appeals to require that typewritten briefs be typed in larger type and permit a correspondingly larger number of pages.

Note to Subdivision (j). Proposed new Rule 28(j) makes provision for calling the court's attention to authorities that come to the party's attention after the brief has been filed. It is patterned after the practice under local rule in some of the circuits.

Rule 29. Brief of an Amicus Curiae

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause

shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Only five circuits presently regulate the filing of the brief of an amicus curiae. See D.C. Cir. Rule 18(j); 1st Cir. Rule 23(10); 6th Cir. Rule 17(4); 9th Cir. Rule 18(9); 10th Cir. Rule 20. This rule follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42.

Rule 30. Appendix to the Briefs

(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) Determination of Contents of Appendix; Cost of Producing. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within ten days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

(c) Alternative Method of Designating Contents of the Appendix; How References to the Record May be Made in the Briefs When Alternative Method is Used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

(d) Arrangement of the Appendix. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set

out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

(e) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

(f) Hearing of Appeals on the Original Record Without the Necessity of an Appendix. A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

1967 NOTE

Subdivision (a). Only two circuits presently require a printed record (5th Cir. Rule 23(a); 8th Cir. Rule 10 (in civil appeals only)), and the rules and practice in those circuits combine to make the difference between a printed record and the appendix, which is now used in eight circuits and in the Supreme Court in lieu of the printed record, largely nominal. The essential characteristics of the appendix method are: (1) the entire record may not be reproduced; (2) instead, the parties are to set out in an appendix to the briefs those parts of the record which in their judgment the judges must consult in order to determine the issues presented by the appeal; (3) the appendix is not the record but merely a selection therefrom for the convenience of the judges of the court of appeals; the record is the actual trial court record, and the record itself is always available to supply inadvertent omissions from the appendix. These essentials are incorporated, either by rule or by practice, in the circuits that continue to require the printed record rather than the appendix. See 5th Cir. Rule 23(a)(9) and 8th Cir. Rule 10(a)–(d).

Subdivision (b). Under the practice in six of the eight circuits which now use the appendix method, unless the parties agree to use a single appendix, the appellant files with his brief an appendix containing the parts of the record which he deems it essential that the court read in order to determine the questions presented. If the appellee deems additional parts of the record necessary he must include such parts as an appendix to his brief. The proposed rules differ from that practice. By the new rule a single appendix is to be filed. It is to be prepared by the appellant, who must include therein those parts which he deems essential and those which the appellee designates as essential.

Under the practice by which each party files his own appendix the resulting reproduction of essential parts of the record is often fragmentary; it is not infrequently necessary to piece several appendices together to arrive at a usable reproduction. Too, there seems to be a tendency on the part of some appellants to reproduce less than what is necessary for a determination of the issues presented (see *Moran Towing Corp.* v. *M. A. Gammino Construction Co.*, 363 F.2d 108 (1st Cir. 1966); *Walters* v. *Shari Music Publishing Corp.*, 298 F.2d 206 (2d Cir. 1962) and cases cited therein; *Morrison* v. *Texas Co.*, 289 F.2d 382 (7th Cir. 1961) and cases cited therein), a tendency which is doubtless encouraged by the requirement in present rules that the appellee reproduce in his separately prepared appendix such necessary parts of the record as are not included by the appellant.

Under the proposed rule responsibility for the preparation of the appendix is placed on the appellant. If the appellee feels that the appellant has omitted essential portions of the record, he may require the appellant to include such portions in the appendix. The appellant is protected against a demand that he reproduce parts which he considers unnecessary by the provisions entitling him to require the appellee to advance the costs of reproducing such parts and authorizing denial of costs for matter unnecessarily reproduced.

Subdivision (c). This subdivision permits the appellant to elect to defer the production of the appendix to the briefs until the briefs of both sides are written, and authorizes a court of appeals to require such deferred filing by rule or order. The advantage of this method of preparing the appendix is that it permits the parties to determine what parts of the record need to be reproduced in the light of the issues actually presented by the briefs. Often neither side is in a position to say precisely what is needed until the briefs are completed. Once the argument on both sides is known, it should be possible to confine the matter reproduced in the appendix to that which is essential to a determination of the appeal or review. This method of preparing the appendix is presently in use in the Tenth Circuit (Rule 17) and in other circuits in review of agency proceedings, and it has proven its value in reducing the volume required to be reproduced. When the record is long, use of this method is likely to result in substantial economy to the parties.

Subdivision (e). The purpose of this subdivision is to reduce the cost of reproducing exhibits. While subdivision (a) requires that 10 copies of the appendix be filed, unless the court requires a lesser number, subdivision (e) permits exhibits necessary for the determination of an appeal to be bound separately, and requires only 4 copies of such a separate volume or volumes to be filed and a single copy to be served on counsel.

Subdivision (f). This subdivision authorizes a court of appeals to dispense with the appendix method of reproducing parts of the record and to hear appeals on the

original record and such copies of it as the court may require.

Since 1962 the Ninth Circuit has permitted all appeals to be heard on the original record and a very limited number of copies. Under the practice as adopted in 1962, any party to an appeal could elect to have the appeal heard on the original record and two copies thereof rather than on the printed record theretofore required. The resulting substantial saving of printing costs led to the election of the new practice in virtually all cases, and by 1967 the use of printed records had ceased. By a recent amendment, the Ninth Circuit has abolished the printed record altogether. Its rules now provide that all appeals are to be heard on the original record, and it has reduced the number of copies required to two sets of copies of the transmitted original papers (excluding copies of exhibits, which need not be filed unless specifically ordered). See 9 Cir. Rule 10, as amended June 2, 1967, effective September 1, 1967. The Eighth Circuit permits appeals in criminal cases and in habeas corpus and 28 U.S.C. § 2255 proceedings to be heard on the original record and two copies thereof. See 8 Cir. Rule 8(i)–(j). The Tenth Circuit permits appeals in all cases to be heard on the original record and four copies thereof whenever the record consists of two hundred pages or less. See 10 Cir. Rule 17(a). This subdivision expressly authorizes the continuation of the practices in the Eighth, Ninth and Tenth Circuits.

The judges of the Court of Appeals for the Ninth Circuit have expressed complete satisfaction with the practice there in use and have suggested that attention be called to the advantages which it offers in terms of reducing cost.

1970 NOTE

Subdivision (a). The amendment of subdivision (a) is related to the amendment of Rule 31(a), which authorizes a court of appeals to shorten the time for filing briefs. By virtue of this amendment, if the time for filing the brief of the appellant is shortened the time for filing the appendix is likewise shortened.

Subdivision (c). As originally written, subdivision (c) permitted the appellant to elect to defer filing of the appendix until 21 days after service of the brief of the appellee. As amended, subdivision (c) requires that an order of court be obtained before filing of the appendix can be deferred, unless a court permits deferred filing by local rule. The amendment should not cause use of the deferred appendix to be viewed with disfavor. In cases involving lengthy records, permission to defer filing of the appendix should be freely granted as an inducement to the parties to include in the appendix only matter that the briefs show to be necessary for consideration by the judges. But the Committee is advised that appellants have elected to defer filing of the appendix in cases involving brief records merely to obtain the 21 day delay. The subdivision is amended to prevent that practice.

TAXATION OF FEES IN APPEALS IN WHICH THE REQUIREMENT OF AN APPENDIX IS DISPENSED WITH

The Judicial Conference of the United States at its session on October 28th and 29th approved the following resolution relating to fees to be taxed in the courts of appeals as submitted by the Judicial Council of the Ninth Circuit with the proviso that its application to any court of appeals shall be at the election of each such court:

For some time it has been the practice in the Ninth Circuit Court of Appeals to dispense with an appendix in an appellate record and to hear the appeal on the original record, with a number of copies thereof being supplied (Rule 30f, Federal Rules of Appellate Procedure). It has been the practice of the Court to tax a fee of $5 in small records and $10 in large records for the time of the clerk involved in preparing such appeals and by way of reimbursement for postage expense. Judicial Conference approval heretofore has not been secured and the Judicial Council of the Ninth Circuit now seeks to fix a flat fee of $15 to be charged as fees for costs to be charged by *any* court of appeals "in any appeal in which the requirement of an appendix is dispensed with pursuant to Rule 30f. Federal Rules of Appellate Procedure."

Rule 31. Filing and Service of Briefs

(a) Time for Serving and Filing Briefs. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

(b) Number of Copies to be Filed and Served. Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

1967 NOTE

A majority of the circuits now require the brief of the appellant to be filed within 30 days from the date on which the record is filed. But in those circuits an ex-

change of designations is unnecessary in the preparation of the appendix. The appellant files with his brief an appendix containing the parts of the record which he deems essential. If the appellee considers other parts essential, he includes those parts in his own appendix. Since the proposed rule requires the appellant to file with his brief an appendix containing necessary parts of the record as designated by both parties, the rule allows the appellant 40 days in order to provide time for the exchange of designations respecting the content of the appendix (see Rule 30(b)).

1970 NOTE

The time prescribed by Rule 31(a) for preparing briefs —40 days to the appellant, 30 days to the appellee—is well within the time that must ordinarily elapse in most circuits before an appeal can be reached for consideration. In those circuits, the time prescribed by the Rule should not be disturbed. But if a court of appeals maintains a current calendar, that is, if an appeal can be heard as soon as the briefs have been filed, or if the practice of the court permits the submission of appeals for preliminary consideration as soon as the briefs have been filed, the court should be free to prescribe shorter periods in the interest of expediting decision.

Rule 32. Form of Briefs, the Appendix and other Papers

(a) Form of Briefs and the Appendix. Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8½ by 11 inches and type matter not exceeding 6½ by 9½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

(b) Form of Other Papers. Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Only two methods of printing are now generally recognized by the circuits—standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

Rule 33. Prehearing Conference

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The uniform rule for review or enforcement of orders of administrative agencies, boards, commissions or officers (see the general note following Rule 15) authorizes a prehearing conference in agency review proceedings. The same considerations which make a prehearing conference desirable in such proceedings may be present in certain cases on appeal from the district courts. The proposed rule is based upon subdivision 11 of the present uniform rule for review of agency orders.

Rule 34. Oral Argument

(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

(c) Order and Content of Argument. The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) Cross and Separate Appeals. A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(e) Non-Appearance of Parties. If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

(f) Submission on Briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) Use of Physical Exhibits at Argument; Removal. If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

A majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request. The Committee is of the view that thirty minutes to each side is sufficient in most cases, but that where additional time is necessary it should be freely granted on a proper showing of cause therefor. It further feels that the matter of time should be left ultimately to each court of appeals, subject to the spirit of the rule that a reasonable time should be allowed for argument. The term "side" is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it. In other particulars this rule follows the usual practice among the circuits. See 3d Cir. Rule 31; 6th Cir. Rule 20; 10th Cir. Rule 23.

1979 AMENDMENT

The proposed amendment, patterned after the recommendations in the Report of the Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 1975, created by Public Law 489 of the 92nd Cong., 2nd Sess., 86 Stat. 807, sets forth general principles and minimum standards to be observed in formulating any local rule.

Rule 35. Determination of Causes by the Court in Banc

(a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(c) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Statutory authority for in banc hearings is found in 28 U.S.C. § 46(c). The proposed rule is responsive to the Supreme Court's view in *Western Pacific Ry. Corp.* v. *Western Pacific Ry. Co.*, 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*.

The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See *Western Pacific Ry. Corp.* v. *Western Pacific Ry. Co.*, supra, 345 U.S. at 262, 73 S.Ct. 656. The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service.

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled "petition for rehearing in banc." Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

1979 AMENDMENT

Under the present rule there is no specific provision for a response to a suggestion that an appeal be heard in banc. This has led to some uncertainty as to whether such a response may be filed. The proposed amendment would resolve this uncertainty.

While the present rule provides a time limit for suggestions for rehearing in banc, it does not deal with the timing of a request that the appeal be heard in banc initially. The proposed amendment fills this gap as well, providing that the suggestion must be made by the date of which the appellee's brief is filed.

Provision is made for circulating the suggestions to members of the panel despite the fact that senior judges on the panel would not be entitled to vote on whether a suggestion will be granted.

Rule 36. Entry of Judgment

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This is the typical rule. See 1st Cir. Rule 29; 3rd Cir. Rule 32; 6th Cir. Rule 21. At present, uncertainty exists as to the date of entry of judgment when the opinion directs subsequent settlement of the precise terms of the judgment, a common practice in cases involving enforcement of agency orders. See Stern and Gressman, Su-

preme Court Practice, p. 203 (3d Ed., 1962). The principle of finality suggests that in such cases entry of judgment should be delayed until approval of the judgment in final form.

Rule 37. Interest on Judgments

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The first sentence makes it clear that if a money judgment is affirmed in the court of appeals, the interest which attaches to money judgments by force of law (see 28 U.S.C. § 1961 and § 2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest. There has been some confusion on this point. See *Blair* v. *Durham*, 139 F.2d 260 (6th Cir., 1943) and cases cited therein.

In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal. In *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate, the district court was powerless to add such interest. The second sentence of the proposed rule is a reminder to the court, the clerk and counsel of the *Briggs* rule. Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

Rule 38. Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Compare 28 U.S.C. § 1912. While both the statute and the usual rule on the subject by courts of appeals (Fourth Circuit Rule 20 is a typical rule) speak of "damages for delay," the courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay. See *Dunscombe* v. *Sayle*, 340 F.2d 311 (5th Cir., 1965), *cert. den.*, 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965); *Lowe* v. *Willacy*, 239 F.2d 179 (9th Cir., 1956); *Griffith Wellpoint Corp.* v. *Munro-Langstroth, Inc.*, 269 F.2d 64 (1st Cir., 1959); *Ginsburg* v. *Stern*, 295 F.2d 698 (3d Cir., 1961). The subjects of interest and damages are separately regulated, contrary to the present practice of combining the two (see Fourth Circuit Rule 20) to make it clear that the awards are distinct and independent. Interest is provided for by law; damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.

Rule 39. Costs

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any

amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES ON ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). Statutory authorization for taxation of costs is found in 28 U.S.C. § 1920. The provisions of this subdivision follow the usual practice in the circuits. A few statutes contain specific provisions in derogation of these general provisions. (See 28 U.S.C. § 1928, which forbids the award of costs to a successful plaintiff in a patent infringement action under the circumstances described by the statute). These statutes are controlling in cases to which they apply.

Subdivision (b). The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.

The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966, 80 Stat. 308 (1 U.S. Code Cong. & Ad. News, p. 349 (1966), 89th Cong., 2d Sess., which amended 28 U.S.C. § 2412, the former general bar to the award of costs against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended section 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are "otherwise specifically provided (for) by statute." Furthermore, the Act of July 18, 1966, *supra*, provides that the amendments of section 2412 which it effects shall apply only to actions filed subsequent to the date of its enactment. The second clause continues in effect, for these and all other cases in which the United States enjoys immunity from costs, the presently prevailing rule that the United States may recover costs as the prevailing party only if it would have suffered them as the losing party.

Subdivision (c). While only five circuits (D.C. Cir. Rule 20(d); 1st Cir. Rule 31(4); 3d Cir. Rule 35(4); 4th Cir. Rule 21(4); 9th Cir. Rule 25, as amended June 2, 1967) presently tax the cost of printing briefs, the proposed rule makes the cost taxable in keeping with the principle of this rule that all cost items expended in the prosecution of a proceeding should be borne by the unsuccessful party.

Subdivision (e). The costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond. They are made taxable in the district court for general convenience. Taxation of the cost of the reporter's transcript is specifically authorized by 28 U.S.C. § 1920, but in the absence of a rule some district courts have held themselves without authority to tax the cost (*Perlman* v. *Feldmann*, 116 F.Supp. 102 (D.Conn., 1953); *Firtag* v. *Gendleman*, 152 F.Supp. 226 (D.D.C., 1957); *Todd Atlantic Shipyards Corps.* v. *The Southport*, 100 F.Supp. 763 (E.D.S.C., 1951). Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner* v. *British Commonwealth Pacific Air Lines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich* v. *Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn* v. *F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

1979 AMENDMENT

Note to Subdivision (c). The proposed amendment would permit variations among the circuits in regulating the maximum rates taxable as costs for printing or otherwise reproducing briefs, appendices, and copies of records authorized by Rule 30(f). The present rule has had a different effect in different circuits depending upon the size of the circuit, the location of the clerk's office, and the location of other cities. As a consequence there was a growing sense that strict adherence to the rule produces some unfairness in some of the circuits and the matter should be made subject to local rule.

Note to Subdivision (d). The present rule makes no provision for objections to a bill of costs. The proposed amendment would allow 10 days for such objections. Cf. Rule 54(d) of the F.R.C.P. It provides further that the mandate shall not be delayed for taxation of costs.

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or

may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3)). It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

1979 AMENDMENT

Note to Subdivision (a). The Standing Committee added to the first sentence of Rule 40(a) the words "or by local rule," to conform to current practice in the circuits. The Standing Committee believes the change noncontroversial.

Note to Subdivision (b). The proposed amendment would eliminate the distinction drawn in the present rule between printed briefs and those duplicated from typewritten pages in fixing their maximum length. See Note to Rule 28. Since petitions for rehearing must be prepared in a short time, making typographic printing less likely, the maximum number of pages is fixed at 15, the figure used in the present rule for petitions duplicated by means other than typographic printing.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The proposed rule follows the rule or practice in a majority of circuits by which copies of the opinion and the judgment serve in lieu of a formal mandate in the ordinary case. Compare Supreme Court Rule 59. Although 28 U.S.C. § 2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule. Compare D.C. Cir. Rule 27(e).

Rule 42. Voluntary Dismissal

(a) Dismissal in the District Court. If an appeal has not been docketed, the appeal may be dismissed by the district court upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.

(b) Dismissal in the Court of Appeals. If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). This subdivision is derived from FRCP 73(a) without change of substance.

Subdivision (b). The first sentence is a common provision in present circuit rules. The second sentence is added. Compare Supreme Court Rule 60.

Rule 43. Substitution of Parties

(a) Death of a Party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the

court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.

(b) Substitution for Other Causes. If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding in his official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). The first three sentences described a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a). The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b), which impliedly authorizes such an appeal.

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 Cyclopedia of Federal Procedure (3d Ed.) § 63.21. The states commonly make special provisions for the event of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t), 16 A.R.S.; New Jersey Rev. Rules 1:3-3; New York Civil Practice Law and Rules, Sec. 1022; Wisconsin Statutes Ann. 274.01(2). The provision in the proposed rule is derived from California Code of Civil Procedure, Sec. 941.

Subdivision (c). This subdivision is derived from FRCP 25(d) and Supreme Court Rule 48, with appropriate changes.

Rule 44. Cases Involving Constitutional Questions Where United States is not a Party

It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is now found in the rules of a majority of the circuits. It is in response to the Act of August 24, 1937 (28 U.S.C. § 2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.

Rule 45. Duties of Clerks

(a) General Provisions. The clerk of a court of appeals shall take the oath and give the bond required by law. Neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while he continues in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day and Christmas Day.

(b) The Docket; Calendar; Other Records Required. The clerk shall keep a book, known as the docket, in such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the folio of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders and judgment shall be entered chronologically in the docket on the folio assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

(c) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) Custody of Records and Papers. The clerk shall have custody of the records and papers of the court. He shall not permit any original record or paper to be taken from his custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

(As amended Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

1967 NOTE

The duties imposed upon clerks of the courts of appeals by this rule are those imposed by rule or practice in a majority of the circuits. The second sentence of subdivision (a) authorizing the closing of the clerk's office on Saturday and non-national legal holidays follows a similar provision respecting the district court clerk's office found in FRCP 77(c) and in FRCrP 56.

1971 NOTE

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 26(a).

Rule 46. Attorneys

(a) Admission to the Bar of a Court of Appeal; Eligibility; Procedure for Admission. An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing his personal statement showing his eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

> I, ..., do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that he appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) Disciplinary Power of the Court over Attorneys. A court a appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Subdivision (a). The basic requirement of membership in the bar of the Supreme Court, or of the highest court of a state, or in another court of appeals or a district court is found, with minor variations, in the rules of ten circuits. The only other requirement in those circuits is that the applicant be of good moral and professional character. In the District of Columbia Circuit applicants other than members of the District of Columbia District bar or the Supreme Court bar must claim membership in the bar of the highest court of a state, territory or possession for three years prior to application for admission (D.C. Cir. Rule 7). Members of the District of Columbia District bar and the Supreme Court bar again excepted, applicants for admission to the District of Columbia Circuit bar must meet precisely defined prelaw and law school study requirements (D.C. Cir. Rule 7½).

A few circuits now require that application for admission be made by oral motion by a sponsor member in open court. The proposed rule permits both the application and the motion by the sponsor member to be in writing, and permits action on the motion without the appearance of the applicant or the sponsor, unless the court otherwise orders.

Subdivision (b). The provision respecting suspension or disbarment is uniform. Third Circuit Rule 8(3) is typical.

Subdivision (c). At present only Fourth Circuit Rule 36 contains an equivalent provision. The purpose of this provision is to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules. It also affords some measure of control over attorneys who are not members of the bar of the court. Several circuits permit a non-member attorney to file briefs and motions, membership being required only at the time of oral argument. And several circuits permit argument pro hac vice by non-member attorneys.

Rule 47. Rules by Courts of Appeals

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule continues the authority now vested in individual courts of appeals by 28 U.S.C. § 2071 to make rules consistent with rules of practice and procedure promulgated by the Supreme Court.

Rule 48. Title

These rules may be known and cited as the Federal Rules of Appellate Procedure.

APPENDIX OF FORMS

Form 1.

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the .....
District of .....

File Number .....

A.B., Plaintiff
v. Notice of Appeal
C.D., Defendant

Notice is hereby given that C. D., defendant above named, hereby appeals to the United States Court of Appeals for the ..... Circuit (from the final judgment) (from the order (describing it)) entered in this action on the ..... day of .....

....., 19....

(S) .....
.....
(Address)
Attorney for C. D.

Form 2.

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A DECISION OF THE TAX COURT

Tax Court of the United States
Washington, D. C.[1]

A.B., Petitioner
v. Docket No. ....
Commissioner of Internal Revenue, Respondent

Notice of Appeal

Notice is hereby given that A. B. hereby appeals to the United States Court of Appeals for the ..... Circuit from [that part of] the decision of this court entered in the above captioned proceeding on the ..... day of ....., 19... [relating to .....].

(S) .....
.....
(Address)
Counsel for A. B.

[1] The name of the Tax Court of the United States has been changed to United States Tax Court by Pub.L. 91-172, 951, Dec. 30, 1969, 83 Stat. 730 (section 7441 of Title 26, Internal Revenue Code).

Form 3.

PETITION FOR REVIEW OF ORDER OF AN AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals for the ..... Circuit

A. B., Petitioner
Petition for Review
v.
XYZ Commission, Respondent

A. B. hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on ....., 19....

(s) .....
Attorney for Petitioner
Address: .....

Form 4.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

United States District Court for the .....
District of .....

United States of America
v. No. .....
A. B.

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, ... being first duly sworn, depose and say that I am the ....., in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
3. Do you own any cash or checking or savings account?
   a. If the answer is yes, state the total value of the items owned.
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   a. If the answer is yes, describe the property and state its approximate value.
5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

.....

SUBSCRIBED AND SWORN To before me this .....
day of ....., 19....

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

.....
District Judge

*

RULES

OF THE

SUPREME COURT

OF

THE UNITED STATES

Adopted April 14, 1980

Effective June 30, 1980

As amended to Jan. 1, 1985

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41. Custody of prisoners in habeas corpus proceedings.
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46. Proceedings in forma pauperis.

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47. Veterans' and seamen's cases.

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51. Rehearings.
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PART XI—APPLICATION OF TERMS

54. Term "state court".
55. Effective date of amendments.

PART I—THE COURT

Rule 1. Clerk

.1. The Clerk shall have custody of all the records and papers of the Court and shall not permit any of them to be taken from his custody except as authorized by the Court. After the conclusion of the proceedings in this Court, any original records and papers transmitted as the record on appeal or certiorari will be returned to the court from which they were received. Pleadings, papers, and briefs filed with the Clerk may not be withdrawn by litigants.

.2. The office of the Clerk will be open, except on a federal legal holiday, from 9 a.m. to 5 p.m. Monday through Friday, and from 9 a.m. to noon Saturday.

.3. The Clerk shall not practice as an attorney or counselor while holding his office. See 28 U.S.C. § 955.

Rule 2. Library

.1. The Bar library will be open to the appropriate personnel of this Court, members of the Bar of this Court, Members of Congress, members of their legal staffs, and attorneys for the United States, its departments and agencies.

.2. The library will be open during such times as the reasonable needs of the Bar require and shall be governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

.3. Books may not be removed from the building, except by a Justice or a member of his legal staff.

Rule 3. Term

.1. The Court will hold an annual Term commencing on the first Monday in October, and may hold a special term whenever necessary. See 28 U.S.C. § 2.

.2. The Court at every Term will announce the date after which no case will be called for argument at that Term unless otherwise ordered for special cause shown.

.3. At the end of each Term, all cases on the docket will be continued to the next Term.

Rule 4. Sessions, quorum, and adjournments

.1. Open sessions of the Court will be held at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless otherwise ordered, the Court will sit to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

.2. Any six Members of the Court shall constitute a quorum. See 28 U.S.C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending, or if no Justice is present the Clerk or a Deputy Clerk, may announce that the Court will not meet until there is a quorum.

.3. The Court in appropriate circumstances may direct the Clerk or the Marshal to announce recesses and adjournments.

PART II—ATTORNEYS AND COUNSELORS

Rule 5. Admission to the bar

.1. It shall be requisite to the admission to practice in this Court that the applicant shall have been admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceding the date of application, and that the applicant appears to the Court to be of good moral and professional character.

.2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other duly authorized official of the proper court evidencing the applicant's admission to practice there and present good standing, and (2) an executed copy of the form approved by the Court and furnished by the Clerk containing (i) the applicant's personal statement and (ii) the statement of two sponsors (who must be members of the Bar of this Court and must personally know, but not be related to, the applicant) endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character.

.3. If the documents submitted by the applicant demonstrate that the applicant possesses the necessary qualifications, the Clerk shall so notify the applicant. Upon the applicant's signing the oath or affirmation and paying the fee required under Rule 45(e), the Clerk shall issue a certificate of admission. If the applicant desires, however, the applicant may be admitted in open court on oral motion by a member of the Bar, provided that the requirements for admission have been satisfied.

.4. Each applicant shall take or subscribe the following oath or affirmation:

I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

Rule 6. Argument pro hac vice

.1. An attorney admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession who has not been such for three years, but who is otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to present oral argument *pro hac vice* in a particular case.

.2. An attorney, barrister, or advocate who is qualified to practice in the courts of a foreign state may be permitted to present oral argument *pro hac vice* in a particular case.

.3. Oral argument *pro hac vice* shall be allowed only on motion of the attorney of record for the party on whose behalf leave is sought. Such motion must briefly and distinctly state the appropriate qualifications of the attorney for whom permission to argue orally is sought; it must be filed with the Clerk, in the form prescribed by Rule 42, no later than the date on which the appellee's or respondent's brief on the merits is due to be filed and it must be accompanied by proof of service as prescribed by Rule 28.

Rule 7. Prohibition against practice

No one serving as a law clerk or secretary to a Justice of this Court and no other employee of this Court shall practice as an attorney or counselor in any court or before any agency of Government while holding that position; nor shall such person after separating from that position participate, by way of any form of professional consultation or assistance, in any case before this Court until two years have elapsed after such separation; nor shall such person ever participate, by way of any form of professional consultation or assistance, in any case that was pending in this Court during the tenure of such position.

Rule 8. Disbarment

Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, such member forthwith may be suspended from practice before this Court. Such member thereupon will be afforded the opportunity to show good cause, within 40 days, why disbarment should not be effectuated. Upon his response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

PART III—ORIGINAL JURISDICTION

Rule 9. Procedure in original actions

.1. This Rule applies only to actions within the Court's original jurisdiction under Article III of the Constitution of the United States. Original applications for writs in aid of the Court's appellate jurisdiction are governed by Part VII of these Rules.

.2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court.

.3. The initial pleading in any original action shall be prefaced by a motion for leave to file such pleading, and both shall be printed in conformity with Rule 33. A brief in support of the motion for leave to file, which shall comply with Rule 33, may be filed with the motion and pleading. Sixty copies

of each document, with proof of service as prescribed by Rule 28, are required, except that, when an adverse party is a State, service shall be made on the Governor and Attorney General of such State. See Rule 28.1.

.4. The case will be placed upon the original docket when the motion for leave to file is filed with the Clerk. The docket fee must be paid at that time, and the appearance of counsel for the plaintiff entered.

.5. Within 60 days after receipt of the motion for leave to file and allied documents, any adverse party may file, with proof of service as prescribed by Rule 28, 60 printed copies of a brief in opposition to such motion. The brief shall conform to Rule 33. When such brief in opposition has been filed, or when the time within which it may be filed has expired, the motion, pleading, and briefs will be distributed to the Court by the Clerk. The Court may thereafter grant or deny the motion, set it down for argument, or take other appropriate action.

.6. Additional pleadings may be filed, and subsequent proceedings had, as the Court may direct. See Rule 28.1.

.7. A summons issuing out of this Court in any original action shall be served on the defendant 60 days before the return day set out therein; and if the defendant, on such service, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte*.

.8. Any process against a State issued from the Court in an original action shall be served on the Governor and Attorney General of such State.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

PART IV—JURISDICTION ON APPEAL

Rule 10. Appeal—how taken—parties—cross-appeal

.1. An appeal to this Court permitted by law shall be taken by filing a notice of appeal in the form, within the time, and at the place prescribed by this Rule, and shall be perfected by docketing the case in this Court as provided in Rule 12.

.2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the date of its entry, and shall specify the statute or statutes under which the appeal to this Court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 28, and proof of service shall be filed with the notice of appeal.

.3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of that court. If the appeal is taken from a state court, the notice of appeal shall be filed with the clerk of the court from whose judgment the appeal is taken, and a copy of the notice of appeal shall be filed with the court possessed of the record.

.4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing of appellant's belief that one or more of the parties below has no interest in the outcome of the appeal. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the appeal. All parties other than appellants shall be appellees, but any appellee who supports the position of an appellant shall meet the time schedule for filing papers which is provided for that appellant, except that any response by any such appellee to a jurisdictional statement shall be filed within 20 days after receipt of the statement.

.5. The Court may permit an appellee, without filing a cross-appeal, to defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted.

.6. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or any one or more of them may appeal separately; or any two or more of them may join in an appeal. Where two or more cases that involve identical or closely related questions are appealed from the same court, it will suffice to file a single jurisdictional statement covering all the issues.

.7. An appellee may take a cross-appeal by perfecting an appeal in the normal manner or, without filing a notice of appeal, by docketing the cross-appeal within the time permitted by Rule 12.4.

Rule 11. Appeal, cross-appeal—time for taking

.1. An appeal to review the judgment of a state court in a criminal case shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court from whose judgment the appeal is taken within 90 days after the entry of

such judgment and the case is docketed within the time provided in Rule 12. See 28 U.S.C. § 2101(d).

.2. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12. See 28 U.S.C. §§ 2101(a), (b), and (c).

.3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

.4. The time for filing a notice of appeal may not be extended.

.5. A cross-appeal shall be in time if it complies with this Rule or if it is docketed as provided in Rule 12.4.

Rule 12. Docketing cases

.1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U.S.C. §§ 1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U.S.C. § 2101(a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.

.2. For good cause shown, a Justice of this Court may extend the time for docketing a case for a period not exceeding 60 days. An application for extension of time within which to docket a case must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed, must have appended a copy of the opinion, must specify the date and place of filing of the notice of appeal and append a copy thereof, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42.2, and 43. Such applications are not favored.

.3. Counsel for the appellant shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case then will be placed on the docket. It shall be the duty of counsel for appellant to notify all appellees, on a form supplied by the Clerk, of the date of docketing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4. Not more than 30 days after receipt of the statement of jurisdiction, counsel for an appellee wishing to cross-appeal shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction on cross-appeal, which shall comply in all respects with Rule 15. The cross-appeal will then be placed on the docket. The issues tendered by a timely cross-appeal docketed under this paragraph may be considered by the Court only in connection with a separate and duly perfected appeal over which this Court has jurisdiction without regard to this paragraph. It shall be the duty of counsel for the cross-appellant to notify the cross-appellee on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-appeal. Such notice shall be served as required by Rule 28. A statement of jurisdiction on cross-appeal may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross appeal may not be extended.

Rule 13. Certification of the record

.1. An appellant at any time prior to action by this Court on the jurisdictional statement, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not required for the docketing of an appeal. If the appellant has not done so, the appellee may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the appeal may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties. Such requests to certify the record prior to action by the Court on the jurisdictional statement, however, shall not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness.

.3. The record may consist of certified copies. But whenever it shall appear necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this Court in lieu of copies, the presiding judge may make any rule or order for safekeeping, transporting, and return of the original papers as may seem proper to him. If the record or stipulated portions thereof have been printed for the use of the court below, this printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests.

.4. When more than one appeal is taken to this Court from the same judgment, it shall be sufficient to prepare a single record containing all the matter designated by the parties or the Clerk of this Court, without duplication.

Rule 14. Dismissing appeals

.1. After a notice of appeal has been filed, but before the case has been docketed in this Court, the parties may dismiss the appeal by stipulation filed in the court whose judgment is the subject of the appeal, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 53.

.2. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, the court whose judgment is the subject of the appeal may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such order thereon with respect to costs as may be just.

.3. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, and the court whose judgment is the subject of the appeal has denied for any reason an appellee's motion to dismiss the appeal, made as provided in the foregoing paragraph, the appellee may have the cause docketed and may seek to have the appeal dismissed in this Court, by producing a certificate, whether in term or vacation, from the clerk of the court whose judgment is the subject of the appeal, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 42 and be accompanied by proof of service as prescribed by Rule 28. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the Court may give judgment for costs against the appellant and in favor of appellee. The appellant shall not be entitled to docket the cause after the appeal shall have been dismissed under this paragraph, except by special leave of Court.

Rule 15. Jurisdictional statement

.1. The jurisdictional statement required by Rule 12 shall contain, in the order here indicated:

(a) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote. See Rule 28.1.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, showing:

(i) The nature of the proceeding and, if the appeal is from a federal court, the statutory basis for federal jurisdiction.

(ii) The date of the entry of the judgment or decree sought to be reviewed, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed. In the case of a cross-appeal docketed under Rule 12.4, reliance upon that Rule shall be expressly noted, and the date of receipt of the appellant's jurisdictional statement by the appellee-cross-appellant shall be stated.

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court, and, if deemed necessary, the cases believed to sustain jurisdiction.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations that the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1(j) of this Rule.

(g) A *concise* statement of the case containing the facts material to consideration of the questions presented. The statement of the case shall also specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court.

(h) A statement of the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

(i) If the appeal is from a decree of a district court granting or denying a preliminary injunction, a showing of the matters in which it is contended that the court has abused its discretion by such action. See *United States v. Corrick*, [56 S.Ct. 829] 298 U.S. 435 [80 L.Ed. 1263] (1936); *Mayo v. Lakeland Highlands Canning Co.* [60 S.Ct. 517] 309 U.S. 310 [84 L.Ed. 774] (1940).

(j) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree appealed from and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) A copy of the notice of appeal showing the date it was filed and the name of the court where it was filed.

(v) Any other appended materials.

If what is required by this paragraph to be appended to the statement is voluminous, it may, if more convenient, be separately presented.

.2. The jurisdictional statement shall be produced in conformity with Rule 33. The Clerk shall not accept any jurisdictional statement that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. The jurisdictional statement shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendices.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980).

Rule 16. Motion to dismiss or affirm—reply—supplemental briefs

.1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

.2. A motion to dismiss or affirm shall comply in all respects with Rules 33 and 42. Forty copies, with proof of service as prescribed by Rule 28, shall be filed with the Clerk. The Clerk shall not accept a motion or brief that does not comply with this Rule and with Rules 33 and 42, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. See Rule 28.1.

.3. A motion to dismiss or affirm shall be as short as possible and may not, either separately or cumulatively, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quota-

tions included in accordance with Rule 34.1(f), and any appendix.

.4. Upon the filing of such motion, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, will be distributed by the Clerk to the Court for its consideration. However, if a jurisdictional statement on cross-appeal has been docketed under Rule 12.4, distribution of both it and the jurisdictional statement on appeal will be delayed until the filing of a motion to dismiss or affirm by the cross-appellee, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A brief opposing a motion to dismiss or affirm may be filed by any appellant, but distribution of the jurisdictional statement and consideration thereof by this Court will not be delayed pending the filing of any such brief. Such brief shall be as short as possible but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7. After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

PART V—JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of of [sic] the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

(As amended July 5, 1984, eff. Aug. 1, 1984.)

Rule 18. Certiorari to a federal court of appeals before judgment

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellant practice and to require immediate settlement in this Court. See 28 U.S.C. § 2101(e); see also, *United States v. Bankers Trust Co.*, [55 S.Ct. 407] 294 U.S. 240 [79 L.Ed. 885] (1935); *Railroad Retirement Board v. Alton R. Co.*, [55 S.Ct. 758] 295 U.S. 330 [79 L.Ed. 1468] (1935); *Rickert Rice Mills v. Fontenot*, [56 S.Ct. 374] 297 U.S. 110 [80 L.Ed. 513] (1936); *Carter v. Carter Coal Co.*,

[56 S.Ct. 855] 298 U.S. 238 [80 L.Ed. 1160] (1936); *Ex parte Quirin*, [63 S.Ct. 1] 317 U.S. 1 [87 L.Ed. 3] (1942); *United States v. Mine Workers*, 330 U.S. 258 (1947); *Youngstown Sheet & Tube Co. v. Sawyer*, [72 S.Ct. 863] 343 U.S. 579 [96 L.Ed. 1153] (1952); *Wilson v. Girard*, [77 S.Ct. 1409] 354 U.S. 524 [1 L.Ed. 1544] (1957); *United States v. Nixon*, [94 S.Ct. 3090] 418 U.S. 683 [41 L.Ed.2d 1039] (1974).

Rule 19. Review on certiorari—how sought—parties

.1. A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the case may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties to the proceeding. Such requests to certify the record prior to action by the Court on the petition for certiorari, however, should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record, or stipulated portions thereof, has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests. The provisions of Rule 13.3 with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari.

.3. Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4. Parties interested jointly, severally, or otherwise in a judgment may join in a petition for a writ of certiorari therefrom; or any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

.5. Not more than 30 days after receipt of the petition for certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a cross-petition for certiorari, which shall comply in all respects with Rule 21. The cross-petition will then be placed on the docket subject, however, to the provisions of Rule 20.5. It shall be the duty of counsel for the cross-petitioner to notify the cross-respondent on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-petition. Such notice shall be served as required by Rule 28. A cross-petition for certiorari may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-petition may not be extended.

.6. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition. The time for filing such response may not be extended.

Rule 20. Review on certiorari—time for petitioning

.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals or a decision of the United States Court of Military Appeals (see 28 U.S.C. Sec. 1259) rendered after June 1, 1984, shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause

shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U.S.C. § 2101(c).

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5. A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in paragraphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

(As amended July 5, 1984, eff. Aug. 1, 1984.)

Rule 21. The petition for certiorari

.1. The petition for writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties. This listing may be done in a footnote. See Rule 28.1.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1(k) of this Rule.

(g) A *concise* statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and

properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

(i) If review of the judgment of a federal court is sought, the statement of the case also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17.

(k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree sought to be reviewed and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) Any other appended materials.

If what is required by this paragraph or by subparagraphs 1(f) and (h) of this Rule, to be included in the petition is voluminous, it may, if more convenient, be separately presented.

.2. The petition for writ of certiorari shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph 1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4. The petition for writ of certiorari shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1(f) of this Rule, and the appendix.

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

Rule 22. Brief in opposition—reply—supplemental briefs

.1. Respondent shall have 30 days (unless enlarged by the Court or a Justice thereof or by the Clerk pursuant to Rule 29.4) after receipt of a petition, within which to file 40 printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. See Rule 17. Such brief in opposition shall comply with Rule 33 and with the requirements of Rule 34 governing a respondent's brief, and shall be served as prescribed by Rule 28. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.2. A brief in opposition shall be as short as possible and may not, in any single case, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1(f), and any appendix. See Rule 28.1.

.3. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant the writ of certiorari may be included in the brief in opposition.

.4. Upon the filing of a brief in opposition, or the expiration of the time allowed therefor, or express waiver of the right to file, the petition and brief, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for certiorari has been filed, distribution of both it and the petition for certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner but distribution under paragraph .4 hereof will not be delayed pending the filing of any

such brief. Such brief shall be as short as possible, but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at anytime while a petition for writ of certiorari is pending calling attention to new cases, or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

Rule 23. Disposition of petition for certiorari

.1. After consideration of the papers distributed pursuant to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

.2. Whenever a petition for writ of certiorari to review a decision of any court is granted, an order to that effect shall be entered, and the Clerk forthwith shall notify the court below and counsel of record. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court. A formal writ shall not issue unless specially directed.

.3. Whenever a petition for writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.

PART VI—JURISDICTION OF CERTIFIED QUESTIONS

Rule 24. Questions certified by a court of appeals or by the Court of Claims

.1. When a federal court of appeals or the Court of Claims shall certify to this Court a question or proposition of law concerning which it desires instruction for the proper decision of a cause (see 28 U.S.C. §§ 1254(3), 1255(2)), the certificate shall contain a statement of the nature of the cause and the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

.2. When a question is certified by a federal court of appeals, and if it appears that there is special reason therefor, this Court, on application or on its own motion, may consider and decide the entire matter in controversy. See 28 U.S.C. § 1254(3).

Rule 25. Procedure in certified cases

.1. When a case is certified, the Clerk will notify the respective parties and shall docket the case. Counsel shall then enter their appearances.

.2. After docketing, the certificate shall be submitted to the Court for a preliminary examination to determine whether the case shall be briefed, set for argument, or the certificate dismissed. No brief may be filed prior to the preliminary examination of the certificate.

.3. If the Court orders that the case be briefed or set down for argument, the parties shall be notified and permitted to file briefs. The Clerk of this Court shall request the clerk of the court from which the case comes to certify the record and transmit it to this Court. Any portion of the record to which the parties wish to direct the Court's particular attention shall be printed in a joint appendix prepared by the appellant or plaintiff in the court below under the procedures provided in Rule 30, but the fact that any part of the record has not been printed shall not prevent the parties or the Court from relying on it.

.4. Briefs on the merits in a case on certificate shall comply with Rules 33, 34, and 35, except that the brief of the party who was appellant or plaintiff below shall be filed within 45 days of the order requiring briefs or setting the case down for argument. See Rule 28.1.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

PART VII—JURISDICTION TO ISSUE EXTRAORDINARY WRITS

Rule 26. Considerations governing issuance of extraordinary writs

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Rule 27. Procedure in seeking an extraordinary writ

.1. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. §§ 1651(a), 2241, or 2254(a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. The petition shall be captioned "In re (name of petitioner)." All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when 40 copies, with proof of service as prescribed by Rule 28 (subject to paragraph .3(b) of this Rule), are filed with the Clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time. The petition shall be as short as possible, and in any event may not exceed 30 pages.

.2. **(a)** If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall identify by names and office or function all persons against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition.

(b) The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21. The petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, within 30 days after receipt of the petition, may file 40 copies of a brief or briefs in opposition thereto, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. If the judge or judges concerned do not desire to respond to the petition, they shall so advise the Clerk and all parties by letter. All persons served pursuant to this paragraph shall be deemed respondents for all purposes in the proceedings in this Court.

.3. **(a)** If the petition seeks issuance of a writ of habeas corpus, it shall comply with the requirements of 28 U.S.C. § 2242, and in particular with the requirement in the last paragraph thereof that it state the reasons for not making application to the district court of the district in which the petitioner is held. If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted his remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, it must be shown that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers and that adequate relief cannot be had in any other form or from any other court. Such writs are rarely granted.

(b) Proceedings under this paragraph .3 will be *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. If a response is ordered, it shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. Neither denial of the petition, without more, nor an order of transfer under authority of 28 U.S.C. § 2241(b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

.4. If the petition seeks issuance of a common-law writ of certiorari under 28 U.S.C. § 1651(a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall follow, insofar as applicable, the form for a petition for certiorari prescribed by Rule 21, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate process. The respondent, within 30 days after receipt of the petition, may file 40 copies of a brief in opposition, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit.

.5. When a brief in opposition under paragraphs .2 and .4 has been filed, or when a response under paragraph .3 has been ordered and filed, or

when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the cause set down for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the case involves a petition for common-law certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 30.

PART VIII—PRACTICE

Rule 28. Filing and service—special rule for service where constitutionality of Act of Congress or state statute is in issue

.1. Pleadings, motions, notices, briefs, or other documents or papers required or permitted to be presented to this Court or to a Justice shall be filed with the Clerk. Any document filed by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance. Any document, except a joint appendix or a brief *amicus curiae*, filed by or on behalf of one or more corporations, shall include a listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation. This listing may be done in a footnote. If such listing has been included in a document filed earlier in the particular case, reference may be made to the earlier document and only amendments to the listing to make it currently accurate need be included in the document currently being filed.

.2. To be timely filed, a document must be received by the Clerk within the time specified for filing, except that any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing, and if there is filed with the Clerk a notarized statement by a member of the Bar of this Court, setting forth the details of the mailing, and stating that to his knowledge the mailing took place on a particular date within the permitted time.

.3. Whenever any pleading, motion, notice, brief, or other document is required by these Rules to be served, such service may be made personally or by mail on each party to the proceeding at or before the time of filing. If the document has been produced under Rule 33, three copies shall be served on each other party separately represented in the proceeding. If the document is typewritten, service of a single copy on each other party separately represented shall suffice. If personal service is made, it may consist of delivery, at the office of counsel of record, to counsel or an employee therein. If service is by mail, it shall consist of depositing the document in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record at his post office address. Where a party is not represented by counsel, service shall be upon the party, personally or by mail.

.4. (a) If the United States or any department, office, agency, officer, or employee thereof is a party to be served, service must be made upon the Solicitor General, Department of Justice, Washington, D.C. 20530; and if a response is required or permitted within a prescribed period after service, the time does not begin to run until the document actually has been received by the Solicitor General's office. Where an agency of the United States is authorized by law to appear in its own behalf as a party, or where an officer or employee of the United States is a party, in addition to the United States, such agency, officer, or employee also must be served, in addition to the Solicitor General; and if a response is required or permitted with a prescribed period, the time does not begin to run until the document actually has been received by both the agency, officer, or employee and the Solicitor General's office.

(b) In any proceeding in this Court wherein the constitutionality of an Act of Congress is drawn in question, and the United States or any department, office, agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. § 2403(a) may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D.C. 20530. In proceedings from any court of the United States, as defined by 28 U.S.C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. § 2403(a), has certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, office, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28

U.S.C. § 2403(b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. § 2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

.5. Whenever proof of service is required by these Rules, it must accompany or be endorsed upon the document in question at the time the document is presented to the Clerk for filing. Proof of service shall be shown by any one of the methods set forth below, and it must contain or be accompanied by a statement that all parties required to be served have been served, together with a list of the names and addresses of those parties; it is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof:

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf such service has been made. (If counsel certifying to such service has not yet entered an appearance in this Court in respect of the cause in which such service is made, an entry of appearance shall accompany the certificate of service.)

(c) By an affidavit of service of the document in question, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, whenever such service is made by any person not a member of the Bar of this Court.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

Rule 29. Computation and enlargement of time

.1. In computing any period of time prescribed or allowed by these Rules, by order of Court, or by an applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a federal legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a federal legal holiday.

.2. Whenever any Justice of this Court or the Clerk is empowered by law or under any provision of these Rules to extend the time for filing any document or paper, an application seeking such extension must be presented to the Clerk within the period sought to be extended. However, an application for extension of time to docket an appeal or to file a petition for certiorari shall be submitted at least 10 days before the specified final filing date and will not be granted, except in the most extraordinary circumstances, if filed less than 10 days before that date.

.3. An application to extend the time within which a party may docket an appeal or file a petition for a writ of certiorari shall be presented in the form prescribed by Rules 12.2 and 20.6, respectively. An application to extend the time within which to file any other document or paper may be presented in the form of a letter to the Clerk setting forth with specificity the reasons why the granting of an extension of time is thought justified. Any application seeking an extension of time must be presented and served upon all other parties as provided in Rule 43, and any such application, if once denied, may not be renewed.

.4. Any application for extension of time to file a brief, motion, joint appendix, or other paper, to designate parts of a record for printing in the appendix, or otherwise to comply with a time limit provided by these Rules (except an application for extension of time to docket an appeal, to file a petition for certiorari, to file a petition for rehearing, or to issue a mandate) shall in the first instance be acted upon by the Clerk, whether addressed to him, to the Court, or to a Justice. Any party aggrieved by the Clerk's action on such application may request that it be submitted to a Justice or to the Court. The Clerk's action under this Rule shall be reported by him to the Court in accordance with the instructions that may be issued to him by the Court.

Rule 30. The joint appendix

.1. Unless the parties agree to use the deferred method allowed in paragraph .4 of this Rule, or the Court so directs, the appellant or petitioner, within 45 days after the order noting or postponing probable jurisdiction or granting the writ of certiorari, shall file 40 copies of a joint appendix, duplicated in the manner prescribed by Rule 33, which shall contain: (1) the relevant docket entries in the courts below; (2) any relevant pleading, jury instruction, finding, conclusion, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the Court's attention. However, any of the foregoing items which have already been reproduced in a jurisdictional statement or the peti-

tion for certiorari complying with Rule 33.1 need not be reproduced again in the joint appendix. The appellant or petitioner shall serve at least three copies of the joint appendix on each of the other parties to the proceeding.

.2. The parties are encouraged to agree to the contents of the joint appendix. In the absence of agreement, the appellant or petitioner, not later than 10 days after the order noting or postponing jurisdiction or granting the writ of certiorari, shall serve on the appellee or respondent a designation of the parts of the record which he intends to include in the joint appendix. If in the judgment of the appellee or respondent the parts of the record so designated are not sufficient, he, within 10 days after receipt of the designation, shall serve upon the appellant or petitioner a designation of additional parts to be included in the joint appendix, and the appellant or petitioner shall include the parts so designated, unless, on his motion in a case where the respondent has been permitted by this Court to proceed *in forma pauperis*, he is excused from supplementing the record.

In making these designations, counsel should include only those materials the Court should examine. Unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in their briefs and oral argument to relevant portions of the record that have not been printed.

.3. At the time that the joint appendix is filed or promptly thereafter, the appellant or petitioner shall file with the Clerk a statement of the costs of preparing the same, and shall serve a copy thereof on each of the other parties to the proceeding. Unless the parties otherwise agree, the cost of producing the joint appendix shall initially be paid by the appellant or petitioner; but if he considers that parts of the record designated by the appellee or respondent are unnecessary for the determination of the issues presented, he may so advise the appellee or respondent who then shall advance the cost of including such parts unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of producing the joint appendix shall be taxed as costs in the case, but if a party shall cause matter to be included in the joint appendix unnecessarily, the Court may impose the cost of producing such matter on that party.

.4. (a) If the parties agree or if the Court shall so order, preparation of the joint appendix may be deferred until after the briefs have been filed, and in that event the appellant or petitioner shall file the joint appendix within 14 days after receipt of the brief of the appellee or respondent. The provisions of paragraphs .1, .2, and .3 of this Rule shall be followed except that the designations referred to therein shall be made by each party at the time his brief is served.

(b) If the deferred method is used, reference in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the joint appendix by placing in brackets the number of each page at the place in the joint appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the joint appendix, he may serve and file typewritten or page-proof copies of his brief within the time required by Rule 35, with appropriate references to the pages of the parts of the record involved. In that event, within 10 days after the joint appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 33 containing references to the pages of the joint appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

.5. At the beginning of the joint appendix there shall be inserted a table of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out following the table of contents. Thereafter, the other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgements, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

.6. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume, or volumes, suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or a court of appeals shall be regarded as an exhibit for the purpose of this paragraph.

.7. The Court by order may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require), or on the appendix used in the court below, if it conforms to the requirements of this Rule.

.8. For good cause shown, the time limits specified in this Rule may be shortened or enlarged by the Court, by a Justice thereof, or by the Clerk under the provisions of Rule 29.4.

Rule 31. Translations

Whenever any record transmitted to this Court contains any document, paper, testimony, or other proceeding in a foreign language without a translation made under the authority of the lower court or admitted to be correct, the clerk of the court transmitting the record shall report the fact immediately to the Clerk of this Court, to the end that this Court may order that a translation be supplied and, if necessary, printed as a part of the joint appendix.

Rule 32. Models, diagrams, and exhibits of material

.1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this Court for its inspection, shall be placed in the custody of the Clerk at least two weeks before the case is heard or submitted.

.2. All such models, diagrams, and exhibits of material placed in the custody of the Clerk must be taken away by the parties within 40 days after the case is decided. When this is not done, it shall be the duty of the Clerk to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

Rule 33. Form of jurisdictional statements, petitions, briefs, appendices, motions, and other documents filed with the court

.1. (a) Except for typewritten filings permitted by Rules 42.2(c), 43, and 46, all jurisdictional statements, petitions, briefs, appendices, and other documents filed with the Court shall be produced by standard typographic printing, which is preferred, or by any photostatic or similar process which produces a clear, black image on white paper; but ordinary carbon copies may not be used.

(b) The text of documents produced by standard typographic printing shall appear in print as 11-point or larger type with 2-point or more leading between lines. Footnotes shall appear in print as 9-point or larger type with 2-point or more leading between lines. Such documents shall be printed on both sides of the page.

(c) The text of documents produced by a photostatic or similar process shall be done in pica type at no more than 10 characters per inch with the lines double-spaced, except that indented quotations and footnotes may be single-spaced. In footnotes, elite type at no more than 12 characters per inch may be used. Such documents may be duplicated on both sides of the page, if practicable. They shall not be reduced in duplication.

(d) Whether duplicated under subparagraph (b) or (c) of this paragraph, documents shall be produced on opaque, unglazed paper 6⅛ by 9¼ inches in size, with type matter approximately 4⅛ by 7⅛ inches, and margins of at least ¾ inch on all sides. The paper shall be firmly bound in at least two places along the left margin so as to make an easily opened volume, and no part of the text shall be obscured by the binding. However, appendices in patent cases may be duplicated in such size as is necessary to utilize copies of patent documents.

.2. (a) All documents filed with the Court must bear on the cover, in the following order, from the top of the page: (1) the number of the case or, if there is none, a space for one; (2) the name of this Court; (3) the Term; (4) the caption of the case as appropriate in this Court; (5) the nature of the proceeding and the name of the court from which the action is brought (*e.g.*, On Appeal from the Supreme Court of California; On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit); (6) the title of the paper (*e.g.*, Jurisdictional Statement, Brief for Respondent, Joint Appendix); (7) the name, post office address, and telephone number of the member of the Bar of this Court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other members of the Bar of this Court or of the Bar of the highest court in their respective states and, if desired, their post office addresses, may be added, but counsel of record shall be clearly identified. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than 11-point or in upper case pica.

(b) The following documents shall have a suitable cover consisting of heavy paper in the color indicated: (1) jurisdictional statements and petitions for writs of certiorari, white; (2) motions, briefs, or memoranda filed in response to jurisdictional statements or petitions for certiorari, light orange; (3) briefs on the merits for appellants or petitioners, light blue; (4) briefs on the merits for appellees or respondents, light red; (5) reply briefs, yellow; (6) intervenor or *amicus curiae* briefs (or motions for leave to file, if bound with brief), green; (7) joint appendices, tan; (8) documents filed by the United States, by any department, office, or agency of the United States, or by any officer or employee of the United States, represented by the Solicitor General, gray. All other documents shall

have a tan cover. Counsel shall be certain that there is adequate contrast between the printing and the color of the cover.

.3. All documents produced by standard typographic printing or its equivalent shall comply with the page limits prescribed by these Rules. See Rules 15.3; 16.3, 16.5, and 16.6; 21.4; 22.2, 22.5, and 22.6; 27.1, 27.2(b), 27.3(b), and 27.4; 34.3 and 34.4; 36.1 and 36.2. Where documents are produced by photostatic or similar process, the following page limits shall apply:

Jurisdictional Statement (Rule 15.3)	65 pages;
Motion to Dismiss or Affirm (Rule 16.3)	65 pages;
Brief Opposing Motion to Dismiss or Affirm (Rule 16.5)	20 pages;
Supplemental Brief (Rule 16.6)	20 pages;
Petition for Certiorari (Rule 21.4)	65 pages;
Brief in Opposition (Rule 22.2)	65 pages;
Reply Brief (Rule 22.5)	20 pages;
Supplemental Brief (Rule 22.6)	20 pages;
Petition Seeking Extraordinary Writ (Rule 27.1)	65 pages;
Brief in Opposition (Rule 27.2(b))	65 pages;
Response to Petition for Habeas Corpus (Rule 27.3(b))	65 pages;
Brief in Opposition (Rule 27.4)	65 pages;
Brief on the Merits (Rule 34.3)	110 pages;
Reply Brief (Rule 34.4)	45 pages;
Brief of *Amicus Curiae* (Rule 36.2)	65 pages.

.4. The Court or a Justice, for good cause shown, may grant leave for the filing of a document in excess of the page limits, but such an application is not favored. An application for such leave shall comply in all respects with Rule 43; and it must be submitted at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

.5. (a) All documents filed with the Court which exceed five pages, regardless of method of duplication (other than joint appendices, which in this respect are governed by Rule 30), shall be preceded by a table of contents, unless the document contains only one item.

(b) All documents which exceed three pages, regardless of method of duplication, shall contain, following the table of contents, a table of authorities (*i.e.*, cases (alphabetically arranged), constitutional provisions, statutes, textbooks, etc.) with correct references to the pages where they are cited.

.6. The body of all documents at their close shall bear the name of counsel of record and such other counsel identified on the cover of the document in conformity with Rule 33.2(a) as may be desired. One copy of every motion and application (other than one to dismiss or affirm under Rule 16) in addition must bear at its close the manuscript signature of counsel of record.

.7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

Rule 34. Briefs on the merits—in general

.1. A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:

(a) The questions presented for review, stated as required by Rule 15.1(a) or Rule 21.1(a), as the case may be. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote. See Rule 28.1.

(c) The table of contents and table of authorities, as required by Rule 33.5.

(d) Citations to the opinions and judgments delivered in the courts below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text, if not already set forth in the jurisdictional statement or petition for certiorari, shall be set forth in an appendix to the brief.

(g) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the Joint Appendix, *e.g.* (J.A. 12) or to the record, *e.g.* (R. 12).

(h) A summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(i) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(j) A conclusion, specifying with particularity the relief to which the party believes himself entitled.

.2. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement by the other side, and except that items (a), (b), (d), (e), and (f) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side. See Rule 28.1.

.3. A brief on the merits shall be as short as possible, but, in any event, shall not exceed 50 pages in length.

.4. A reply brief shall conform to such portions of the Rule as are applicable to the brief of an appellee or respondent, but need not contain a summary of argument, if appropriately divided by topical headings. A reply brief shall not exceed 20 pages in length.

.5. Whenever, in the brief of any party, a reference is made to the Joint Appendix or the record, it must be accompanied by the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge must be indicated, *e.g.* (Pl.Ex. 14; R. 199, 2134).

.6. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court. (As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

Rule 35. Briefs on the merits—time for filing

.1. Counsel for the appellant or petitioner shall file with the Clerk 40 copies of the printed brief on the merits within 45 days of the order noting or postponing probable jurisdiction, or of the order granting the writ of certiorari.

.2. Forty printed copies of the brief of the appellee or respondent shall be filed with the Clerk within 30 days after the receipt by him of the brief filed by the appellant or petitioner.

.3. A reply brief will be received no later than one week before the date of oral argument, and only by leave of Court thereafter.

.4. The periods of time stated in paragraphs .1 and .2 of this Rule may be enlarged as provided in Rule 29, upon application duly made; or, if a case is advanced for hearing, the time for filing briefs may be abridged as circumstances require, pursuant to order of the Court on its own or a party's application.

.5. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file 40 printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these Rules, up to the time the case is called for hearing, or, by leave of Court, thereafter.

.6. No brief will be received through the Clerk or otherwise after a case has been argued or submitted, except from a party and upon leave of the Court.

.7. No brief will be received by the Clerk unless the same shall be accompanied by proof of service as required by Rule 28.

Rule 36. Brief of an amicus curiae

.1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, accompanied by written consent of the parties, may be filed only if submitted within the time allowed for the filing of the motion to dismiss or affirm or the brief in opposition to the petition for certiorari. A motion for leave to file such a brief when consent has been refused is not favored. Any such motion must be filed within the time allowed for filing of the brief and must be accompanied by the proposed brief. In any event, no such brief shall exceed 20 pages in length.

.2. A brief of an *amicus curiae* in a case before the Court for oral argument may be filed when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported and if in support of neither party, within the time allowed for filing appellant's or petitioner's brief. Any such brief must identify the party supported, shall be as concise as possible, and in no event shall exceed 30 pages in length. No reply brief of an *amicus curiae* will be received.

.3. When consent to the filing of a brief of an *amicus curiae* in a case before the Court for oral argument is refused by a party to the case, a motion for leave to file, accompanied by the proposed brief, complying with the 30-page limit, may be presented to the Court. No such motion shall be received unless submitted within the time allowed for the filing of an *amicus* brief on written consent. The motion shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

.4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof.

.5. All briefs, motions, and responses filed under this Rule shall comply with the applicable provisions of Rules 33, 34, and 42 (except that it shall be sufficient to set forth the interest of the *amicus curiae*, the argument, the summary of argument, and the conclusion); and shall be accompanied by proof of service as required by Rule 28.

Rule 37. Call and order of the calendar

.1. The Clerk, at the commencement of each Term, and periodically thereafter, shall prepare a calendar consisting of cases available for argument. Cases will be calendared so that they will not normally be called for argument less than two weeks after the brief of the appellee or respondent is due. The Clerk shall keep the calendar current throughout the Term, adding cases as they are set down for argument, and making rearrangements as required.

.2. Unless otherwise ordered, the Court, on the first Monday of each Term, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the Term in the same order, except that the arrangement of cases on the calendar shall be subject to modification in the light of the availability of appendices, extensions of time to file briefs, orders advancing, postponing or specially setting arguments, and other relevant factors. The Clerk will advise counsel seasonably when they are required to be present in the Court. He shall periodically publish hearing lists in advance of each argument session, for the convenience of counsel and the information of the public.

.3. On the Court's own motion, or on motion of one or more parties, the Court may order that two or more cases, involving what appear to be the same or related questions, be argued together as one case, or on such terms as may be prescribed.

Rule 38. Oral argument

.1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. Counsel should assume that all Members of the Court have read the briefs in advance of argument. *The Court looks with disfavor on any oral argument that is read from a prepared text.* The Court is also reluctant to accept the submission of briefs, without oral argument, of any case in which jurisdiction has been noted or postponed to the merits or certiorari has been granted. Notwithstanding any such submission, the Court may require oral argument by the parties.

.2. The appellant or petitioner is entitled to open and conclude the argument. When there is a cross-appeal or a cross-writ of certiorari it shall be argued with the initial appeal or writ as one case and in the time of one case, and the Court will advise the parties which one is to open and close.

.3. Unless otherwise directed, one-half hour on each side is allowed for argument. Counsel is not required to use all the allotted time. Any request for additional time shall be presented by motion to the Court filed under Rule 42 not later than 15 days after service of appellant's or petitioner's brief on the merits, and shall set forth with specificity and conciseness why the case cannot be presented within the half-hour limitation.

.4. Only one counsel will be heard for each side, except by special permission granted upon a request presented not later than 15 days after service of the petitioner's or appellant's brief on the merits. Such request shall be by a motion to the Court under Rule 42, and shall set forth with specificity and conciseness why more than one counsel should be heard. Divided arguments are not favored.

.5. In any case, and regardless of the number of counsel participating, counsel having the opening will present his case fairly and completely and not reserve points of substance for rebuttal.

.6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

.7. By leave of Court, and subject to paragraph .4 of this Rule, counsel for an *amicus curiae*

whose brief has been duly filed pursuant to Rule 36 may, with the consent of a party, argue orally on the side of such party. In the absence of such consent, argument by counsel for an *amicus curiae* may be made only by leave of Court, on motion particularly setting forth why such argument is thought to provide assistance to the Court not otherwise available. Any such motion will be granted only in the most extraordinary circumstances.

Rule 39. Form of typewritten papers

.1. All papers specifically permitted by these Rules to be presented to the Court without being printed shall, subject to Rule 46.3, be typewritten or otherwise duplicated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-space. All copies presented to the Court must be legible.

.2. The original of any such motion or application, except a motion to dismiss or affirm, must be signed in manuscript by the party or by counsel of record.

Rule 40. Death, substitution, and revivor—public officers, substitution and description

.1. Whenever any party shall die after filing a notice of appeal to this Court or a petition for writ of certiorari, the proper representative of the deceased may appear and, upon motion, may be substituted in an appropriate case as a party to the proceeding. If such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such an order, if appellee or respondent, shall be entitled to have the appeal or petition for writ of certiorari dismissed or the judgment vacated for mootness, as may be appropriate. The party so moving, if an appellant or petitioner, shall be entitled to proceed as in other cases of nonappearance by appellee or respondent. Such substitution, or, in default thereof, such suggestion, must be made within six months after the death of the party, or the case shall abate.

.2. Whenever, in the case of a suggestion made as provided in paragraph .1 of this Rule, the case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no proper representative within the jurisdiction of that court, but does have a proper representative elsewhere, proceedings then shall be had as this Court may direct.

.3. When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

.4. When a public officer is a party in a proceeding here in his official capacity, he may be described as a party by his official title rather than by name; but the Court may require his name to be added.

Rule 41. Custody of prisoners in habeas corpus proceedings

.1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this Rule. Upon application of a custodian showing a need therefor, the court, Justice, or judge rendering the decision under review may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

.2. Pending such review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as any appear fitting to the court, Justice, or judge rendering the decision, or to the court of appeals or to this Court or to a judge or Justice of either court.

.3. Pending such review of a decision ordering release, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court, Justice, or judge rendering the decision, or the court of appeals or this Court, or a judge or Justice of either court, shall otherwise order.

.4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this Court unless for reasons shown to the court of appeals or to this Court, or to a judge or Justice of either court, the order shall be modified or an independent order respecting custody, enlargement, or surety shall be made.

Rule 42. Motions to the court

.1. Every motion to the Court shall state clearly its object, the facts on which it is based, and (except for motions under Rule 27) may present legal argument in support thereof. No separate briefs may be filed. All motions shall be as short as possible, and shall comply with any other applicable page limit. For an application or motion addressed to a single Justice, see Rule 43.

.2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 9.3.

(b) A motion to dismiss or affirm made under Rule 16, a motion to dismiss as moot (or a suggestion of mootness), a motion for permission to file a brief *amicus curiae*, any motion the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket or dismiss under Rule 14, or a motion for voluntary dismissal under Rule 53), and any motion to the Court longer than five pages, shall be duplicated as provided in Rule 33, and shall comply with all other requirements of that Rule. Forty copies of the motion shall be filed.

(c) Any other motion to the Court may be typewritten in accordance with Rule 39, but the Court may subsequently require any such motion to be duplicated by the moving party in the manner provided by Rule 33.

.3. A motion to the Court shall be filed with the Clerk, with proof of service as provided by Rule 28, unless *ex parte* in nature. No motion shall be presented in open court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument will not be heard on any motion unless the Court so directs.

.4. A response to a motion shall be made as promptly as possible considering the nature of the relief asked and any asserted need for emergency action, and, in any event, shall be made within 10 days of receipt, unless otherwise ordered by the Court or a Justice, or by the Clerk under the provisions of Rule 29.4. A response to a printed motion shall be printed if time permits. However, in appropriate cases, the Court in its discretion may act on a motion without waiting for a response.

Rule 43. Motions and applications to individual justices

.1. Any motion or application addressed to an individual Justice shall normally be submitted to the Clerk, who will promptly transmit it to the Justice concerned. If oral argument on the application is deemed imperative, request therefor shall be included in the application.

.2. Any motion or application addressed to an individual Justice shall be filed in the form prescribed by Rule 39, and shall be accompanied by proof of service on all other parties. See Rule 28.1.

.3. The Clerk in due course will advise all counsel concerned, by means as speedy as may be appropriate, of the time and place of the hearing, if any, and of the disposition made of the motion or application.

.4. The motion or application will be addressed to the Justice allotted to the Circuit within which the case arises. When the Circuit Justice is unavailable, for any reason, a motion or application addressed to that Justice shall be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

.5. A Justice denying a motion or application made to him will note his denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is out of time under Rule 29.3, the party making the motion or application, except in the case of an application for extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except where the denial has been without prejudice, any such renewed motion or application is not favored.

.6. Any Justice to whom a motion or application for a stay or for bail is submitted may refer it to the Court for determination.

(As amended Oct. 21, 1980, eff. Nov. 21, 1980.)

Rule 44. Stays

.1. A stay may be granted by a Justice of this Court as permitted by law; and a writ of injunction may be granted by any Justice in a case where it might be granted by the Court.

.2. Whenever a party desires a stay pending review in this Court, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or to a Justice of this Court, a motion to stay the enforcement of the judgment of which review is sought. If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court, or Justice may require. The bond shall be conditioned on satisfaction of the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and on full satisfaction of any modified judgment and such costs, interest, and damages as this Court may adjudge and award. When the

judgment is for the recovery of money not otherwise secured, the amount of bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs, interest, and damages for delay, unless the judge, court, or Justice, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy, as in a real action, replevin, or an action to foreclose a mortgage, or when the property is in the custody of the court, or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein the proceeding appealed from was had, the amount of the bond shall be fixed at such sum as will secure only the amount recovered for the use and detention of the property, costs, interest, and damages for delay.

.3. A petitioner entitled thereto may present to a Justice of this Court an application to stay the enforcement of the judgment sought to be reviewed on certiorari. 28 U.S.C. § 2101(f).

.4. An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof. Any application must identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set forth with specificity the reasons why the granting of a stay or injunction is deemed justified. Any such application is governed by Rule 43.

.5. If an application for a stay addressed to the Court is received in vacation, the Clerk will refer it pursuant to Rule 43.4.

Rule 45. Fees

In pursuance of 28 U.S.C. § 1911, the fees to be charged by the Clerk are fixed as follows:

(a) For docketing a case on appeal (except a motion to docket and dismiss under Rule 14.3, wherein the fee is $50) or on petition for writ of certiorari, or docketing any other proceeding, except cases involving certified questions, $200, to be increased to $300 in a case on appeal, or writ of certiorari, or in other circumstances when oral argument is permitted.

(b) For filing a petition for rehearing, $50.

(c) For a photographic reproduction and certification of any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents per page.

(d) For a certificate and seal, $10.

(e) For admission to the Bar and certificate under seal, $100.

(f) For a duplicate certificate of an admission to the Bar under seal, $10.

PART IX—SPECIAL PROCEEDINGS

Rule 46. Proceedings in forma pauperis

.1. A party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit in the form prescribed in Fed.Rules App.Proc., Form 4 (as adapted, if the party is seeking a writ of certiorari), setting forth with particularity facts showing that he comes within the statutory requirements. See 28 U.S.C. § 1915. However, the affidavit need not state the issues to be presented, and if the district court or the court of appeals has appointed counsel under the Criminal Justice Act of 1964, as amended, the party need not file an affidavit. See 18 U.S.C. § 3006A(d)(6). The motion shall also state whether or not leave to proceed *in forma pauperis* was sought in any court below and, if so, whether leave was granted.

.2. With the motion, and affidavit if required, there shall be filed the appropriate substantive document—jurisdictional statement, petition for writ of certiorari, or motion for leave to file, as the case may be—which shall comply in every respect with the Rules governing the same, except that it shall be sufficient to file a single copy thereof.

.3. All papers and documents presented under this Rule shall be clearly legible and should, whenever possible, comply with Rule 39. While making due allowance for any case presented under this Rule by a person appearing *pro se* the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules, or when it appears that the document is obviously and jurisdictionally out of time.

.4. When the papers required by paragraphs .1 and .2 of this Rule are presented to the Clerk, accompanied by proof of service as prescribed by Rule 28, he, without payment of any docket or

other fees, will file them, and place the case on the docket.

.5. The appellee or respondent in a case *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of a single response, typewritten or otherwise duplicated, with proof of service as required by Rule 28, will suffice whenever petitioner or appellant has filed typewritten papers. The appellee or respondent, in such response or in a separate document filed earlier, may challenge the grounds for the motion to proceed *in forma pauperis.*

.6. Whenever the Court appoints a member of the Bar to serve as counsel for an indigent party in a case set for oral argument, the briefs prepared by such counsel, unless he requests otherwise, will be printed under the supervision of the Clerk. The Clerk also will reimburse such counsel for necessary travel expenses to Washington, D.C., and return, in connection with the argument.

.7. Where this Court has granted certiorari or noted or postponed probable jurisdiction in a federal case involving the validity of a federal or state criminal judgment, and where the defendant in the original criminal proceeding is financially unable to obtain adequate representation or to meet the necessary expenses in this Court, the Court will appoint counsel who may be compensated, and whose necessary expenses may be repaid, to the extent provided by the Criminal Justice Act of 1964, as amended (18 U.S.C. § 3006A).

Rule 47. Veterans' and seamen's cases

.1. A veteran suing to establish reemployment rights under 38 U.S.C. § 2022, or under similar provisions of law exempting veterans from the payment of fees or court costs, may proceed upon typewritten papers as under Rule 46, except that the motion shall ask leave to proceed as a veteran, and the affidavit shall set forth the moving party's status as a veteran.

.2. A seaman suing pursuant to 28 U.S.C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but he is not relieved of printing costs nor entitled to proceed on typewritten papers except by separate motion, or unless, by motion and affidavit, he brings himself within Rule 46.

.3. An accused person petitioning for a writ of certiorari pursuant to 28 U.S.C. Sec. 1259 may proceed without prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not relieved of the printing requirements under Rule 33 and is not entitled to proceed on typewritten papers except as authorized by the Court on separate motion.

(As amended July 5, 1984, eff. Aug. 1, 1984.)

PART X—DISPOSITION OF CASES

Rule 48. Opinions of the court

.1. All opinions of the Court shall be handed to the Clerk immediately upon delivery thereof. He shall deliver copies to the Reporter of Decisions and shall cause the opinions to be issued in slip form. The opinions shall be filed by the Clerk for preservation.

.2. The Reporter of Decisions shall prepare the opinions for publication in preliminary prints and bound volumes of the United States Reports.

Rule 49. Interest and damages

.1. Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment below was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate shall contain instructions with respect to allowance of interest. Interest will be allowed at the same rate that similar judgments bear interest in the courts of the State where the judgment was entered or was directed to be entered.

.2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

Rule 50. Costs

.1. In a case of affirmance of any judgment or decree by this Court, costs shall be paid by appellant or petitioner, unless otherwise ordered by the Court.

.2. In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to appellant or petitioner, unless otherwise ordered by the Court.

.3. The fees of the Clerk and the costs of serving process and printing the joint appendix in this Court are taxable items. The costs of the transcript of record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs,

motions, petitions, or jurisdictional statements are not taxable.

.4. In a case where a question has been certified, including a case where the certificate is dismissed, costs shall be equally divided unless otherwise ordered by the Court; but where a decision is rendered on the whole matter in controversy (see Rule 24.2), costs shall be allowed as provided in paragraphs .1 and .2 of this Rule.

.5. In a civil action commenced on or after July 18, 1966, costs under this Rule shall be allowed for or against the United States, or an officer or agent thereof, unless expressly waived or otherwise ordered by the Court. See 28 U.S.C. § 2412. In any other civil action, no such costs shall be allowed, except where specifically authorized by statute and directed by the Court.

.6. When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate or other proper process sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the Clerk any bill of costs.

.7. In an appropriate instance, the Court may adjudge double costs.

Rule 51. Rehearings

.1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty copies, produced in conformity with Rule 33, must be filed (except where the party is proceeding *in forma pauperis* under Rule 46), accompanied by proof of service as prescribed by Rule 28. Such petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition for rehearing is not subject to oral argument, and will not be granted except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court. See also Rule 52.2.

.2. A petition for rehearing of an order denying a petition for writ of certiorari shall comply with all the form and filing requirements of paragraph .1, but its grounds must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented. Counsel must certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel or of the party when not represented by counsel. A petition for rehearing without such certificate shall be rejected by the Clerk. Such petition is not subject to oral argument.

.3. No response to a petition for rehearing will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response.

.4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this Rule, will not be received.

Rule 52. Process; mandates

.1. All process of this Court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

.2. In a case coming from a state court, mandate shall issue as of course after the expiration of 25 days from the day the judgment is entered, unless the time is shortened or enlarged by the Court or a Justice, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing, unless otherwise ordered, will stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith. When, however, a petition for rehearing is not acted upon prior to adjournment, or is filed after the Court adjourns, the judgment or mandate of the Court will not be stayed unless specifically ordered by the Court or a Justice.

.3. In a case coming from a federal court, a formal mandate will not issue, unless specially directed; instead, the Clerk will send the proper court a copy of the opinion or order of the Court and a certified copy of the judgment (which shall include provisions for the recovery of costs, if any are awarded). In all other respects, the provisions of paragraph .2 apply.

Rule 53. Dismissing causes

.1. Whenever the parties thereto, at any stage of the proceedings, file with the Clerk an agreement in writing that any cause be dismissed, specifying the terms with respect to costs, and pay to the Clerk any fees that may be due, the Clerk, without further reference to the Court, shall enter an order of dismissal.

.2. (a) Whenever an appellant or petitioner in this Court files with the Clerk a motion to dismiss a cause to which he is a party, with proof of service as prescribed by Rule 28, and tenders to the Clerk any fees and costs that may be due, the adverse party, within 15 days after service thereof, may file

an objection, limited to the quantum of damages and costs in this Court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are more than one. The Clerk will refuse to receive any objection not so limited.

(b) Where the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal, within 10 days thereafter, may file a reply, after which time the matter shall be laid before the Court for its determination.

(c) If no objection is filed, or if upon objection going only to the quantum of damages and costs in this Court, the party moving for dismissal, within 10 days thereafter, shall tender the whole of such additional damages and costs demanded, the Clerk, without further reference to the Court, shall enter an order of dismissal. If, after objection as to quantum of damages and costs in this Court, the moving party does not respond with such a tender within 10 days, the Clerk shall report the matter to the Court for its determination.

.3. No mandate or other process shall issue on a dismissal under this Rule without an order of the Court.

PART XI—APPLICATION OF TERMS

Rule 54. Term "state court"

The term "state court" when used in these Rules normally includes the District of Columbia Court of Appeals and the Supreme Court of the Commonwealth of Puerto Rico (see 28 U.S.C. §§ 1257, 1258), and references in these Rules to the law and statutes of a State normally include the law and statutes of the District of Columbia and of the Commonwealth of Puerto Rico.

Rule 55. Effective date of amendments

The amendments to these Rules adopted April 14, 1980, shall become effective June 30, 1980.

Title 18, United States Code
Crimes and Criminal Procedure

Title 18 of the United States Code, entitled "Crimes and Criminal Procedure", was revised, codified and enacted into positive law by Act June 25, 1948, c. 645, § 1, 62 Stat. 683.

Sections 2 to 21, inclusive, of Act June 25, 1948, contained certain executing provisions and made enumerated conforming amendments to sections in other Titles of the United States Code. See Miscellaneous Provisions following Title 18, Crimes and Criminal Procedure.

Sections 20 and 21 of Act June 25, 1948, provide as follows:

> "Sec. 20. This Act shall take effect September 1, 1948.
>
> "Sec. 21. The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

The "Schedule of Laws Repealed" referred to in section 21, above, is set out in full in the volume of U.S.C.A. covering the end of Title 18, Crimes and Criminal Procedure.

*

TITLE 18

CRIMES AND CRIMINAL PROCEDURE

Act June 25, 1948, c. 645, § 1, 62 Stat. 683

As amended to January 1, 1985

Part — Sec.

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II. CRIMINAL PROCEDURE 3001
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IV. CORRECTION OF YOUTHFUL OFFENDERS 5001
V. IMMUNITY OF WITNESSES 6001

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II. UNLAWFUL POSSESSION OR RECEIPT OF FIREARMS
III. INTERSTATE AGREEMENT ON DETAINERS
IV. CLASSIFIED INFORMATION PROCEDURES ACT
V. TREATIES OF EXTRADITION

1 Appendix analysis editorially added.

Effective Date and Savings Provisions of Sentencing Reform Act of 1984 (Pub.L. 98–473, Title II, c. II, §§ 211 to 239). See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

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[1] Heading of chapter amended without amending analysis.

[2] Chapter added without adding chapter heading to analysis.

CHAPTER 1—GENERAL PROVISIONS

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15. Obligation or other security of foreign government defined.
16. Crime of violence defined.
20.[1] Insanity Defense.

[1] So in original. No sections 17 to 19 have been enacted.

Amendment of Analysis

Pub.L. 98–473, § 218(b), Oct. 12, 1984, 98 Stat. 2027, amended the item relating to section 1, effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473, to read as follows: "1. Repealed.".

EXECUTIVE ORDER NO. 11396

Feb. 7, 1968, 33 F.R. 2689

COORDINATION BY ATTORNEY GENERAL OF FEDERAL LAW ENFORCEMENT AND CRIME PREVENTION PROGRAMS

WHEREAS the problem of crime in America today presents the Nation with a major challenge calling for maximum law enforcement efforts at every level of government;

WHEREAS coordination of all Federal criminal law enforcement activities and crime prevention programs is desirable in order to achieve more effective results;

WHEREAS the Federal Government has acknowledged the need to provide assistance to State and local law enforcement agencies in the development and administration of programs directed to the prevention and control of crime;

WHEREAS to provide such assistance the Congress has authorized various departments and agencies of the Federal Government to develop programs which may benefit State and local efforts directed at the prevention and control of crime, and the coordination of such programs is desirable to develop and administer them most effectively; and

WHEREAS the Attorney General, as the chief law officer of the Federal Government, is charged with the responsibility for all prosecutions for violations of the Federal criminal statutes and is authorized under the Law Enforcement Assistance Act of 1965 (79 Stat. 828) [formerly set out as a note preceding section 3001 of this title] to cooperate with and assist State, local, or other public or private agencies in matters relating to law enforcement organization, techniques and practices, and the prevention and control of crime;

NOW, THEREFORE, by virtue of the authority vested in the President by the Constitution and laws of the United States, it is ordered as follows:

Section 1. The Attorney General is hereby designated to facilitate and coordinate (1) the criminal law enforcement activities and crime prevention programs of all Federal departments and agencies, and (2) the activities of such departments and agencies relating to the development and implementation of Federal programs which are designed, in whole or in substantial part, to assist State and local law enforcement agencies and crime prevention activities. The Attorney General may promulgate such rules and regulations and take such actions as he shall deem necessary or appropriate to carry out his functions under this Order.

Sec. 2. Each Federal department and agency is directed to cooperate with the Attorney General in the performance of his functions under this Order and shall, to the extent permitted by law and within the limits of available funds, furnish him such reports, information, and assistance as he may request.

LYNDON B. JOHNSON

§ 1. Offenses classified

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which, as set forth in the provision defining the offense, does not exceed imprisonment for a period of six months or a fine of not more than $5,000 for an individual

and $10,000 for a person other than an individual, or both, is a petty offense.

(As amended Oct. 30, 1984, Pub.L. 98–596, § 8, 98 Stat. 3138.)

Repeal of Section

Pub.L. 98–473, § 218(a)(1), Oct. 12, 1984, 98 Stat. 2027, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Historical and Revision Notes

Based on title 18 (Mar. 4, 1909, ch. 321, § 335, 35 Stat. 1152; Dec. 16, 1930, ch. 15, 46 Stat. 1029).

Clarification of felony and misdemeanor punishments.—The former Committee on Revision of the Laws of the House received from members of the Federal bench and bar numerous requests that the inconsistency between the provisions of section 541 of title 18 U.S.C., 1940 ed., and the 29 sections listed below, be eliminated.

Said 29 sections appear in the United States Code, 1940 ed., as listed:

Title	*Section*
8	138
8	139
8	142
8	143
8	279
8	281
10	15
10	866(e)
11	205(p)
12	95
12	581
12	591
12	592
12	1121
12	1311
15	13a
18	402(2)
18	709
19	1305
19	1593
19	1600
19	1601
21	333(a), (b)
22	131
38	103
46	808
46	1228
49	10
49	121

Several of these sections will appear in this revision and in all such instances the language denominating the crime as a misdemeanor was deleted.

United States District Judge C. C. Wyche, of the Western District of South Carolina, suggested that said section 541 be repealed and that a new section be enacted defining felonies and misdemeanors according to nature of offense instead of by punishment to be inflicted.

United States District Judge W. Calvin Chestnut, of the District of Maryland, suggested a clarification of the definition and classification of Federal crimes-treason and possibly those providing capital punishment, felonies, misdemeanors, and petty offenses.

This section as revised conforms substantially with a draft submitted by the Lawyers' Club of Los Angeles through Rollin L. McNitt, chairman of its legislative committee.

Two circuit courts of appeals have held that if a statute specifically designated a crime as a "misdemeanor" but prescribed a punishment which would bring it within the definition of a felony under section 541 of title 18, U.S.C., 1940 ed., the definition was controlling, notwithstanding the specific designation of the crime as a "misdemeanor." (See *Hoss v. United States*, Okl.1916, 232 F. 328, 146 C.C.A. 376; and *Sheridan v. United States*, Or.1916, 236 F. 305, 149 C.C.A. 437, certiorari denied, 1916, 37 S.Ct. 402, 243 U.S. 638, 61 L.Ed. 942.)

One district court, however, has twice ruled that the specific description of a crime as a "misdemeanor" was controlling. (See *United States v. Venturini*, D.C.Ala. 1931, 1 F.Supp. 213 and *Chapman v. United States*, D.C.Ala.1931, 3 F.Supp. 900.)

The Supreme Court of the United States has never specifically passed upon this point. (See, however, *Carroll v. United States*, 1924, 45 S.Ct. 280, 267 U.S. 132, 69 L.Ed. 543.)

The word "misdemeanor" is used in paragraph (3) in preference to the word "offenses" to conform to the interpretation of "petty offenses" by the Supreme Court of the United States in *Duke v. United States* (1937, 57 S.Ct. 835, 301 U.S. 492, 81 L.Ed. 1243), wherein the Court stated that the evident object of the proviso, now paragraph (3), was to bring about a "subdivision of misdemeanors of minor gravity to be known as petty offenses."

Confinement in common jail.—Word "imprisonment" in paragraph (3) was substituted for "confinement in a common jail", since it is unnecessary to describe the place of confinement in view of section 4082 of this title, which provides that all persons convicted of an offense against the United States shall be committed for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences of all such persons shall be served.

Omission of hard labor provisions.—Words "without hard labor" before "for a period of six months" were omitted to conform to policy followed by codifiers of 1909 Criminal Code, and because such a provision is obsolete in view of section 4082 of this title, authorizing commitment to the custody of the Attorney General and sections 4001 and 4121 et seq. of this title, making all Federal prisoners subject to whatever discipline may be prescribed in the prisons to which they are committed. (See S. Rept. 10, pt. I, pp. 12 and 13, 60th Cong., 1st sess., to accompany S. 2982.)

Omission of information or complaint.—The provision "and all such petty offenses may be prosecuted upon

information or complaint" was omitted as covered by rule 7(a) of the Federal Rules of Criminal Procedure.

Reconciliation of punishment provisions.—A comparative study was made of the penalty provisions of all offenses enumerated in part I of this title. In attempting to reconcile inconsistent and incongruous punishments for offenses involving the same degree of moral turpitude, the following criteria were generally observed.

1. Heinous felonies: For a felony involving a high degree of moral turpitude, such as treason, murder, kidnapping, robbery, etc., a severe penalty was considered justified.

2. Ordinary felonies: For a felony involving a lesser degree of moral turpitude than a heinous felony, a maximum imprisonment of 5 years was adopted. At present numerous statutes, such as the National Motor Vehicle Theft Act and the White Slave Traffic Act, carry the 5-year imprisonment penalty, while fraud, filing false statements, etc., carry a 10-year imprisonment penalty. These discrepancies seem incongruous, especially when it is remembered that the maximum penalty is rarely imposed.

3. Offense mala prohibita: For violations of regulatory statutes, constituting mala prohibita, a maximum imprisonment penalty of 1 year seemed adequate. This prevents the stigma and consequence of a felony conviction from attaching to the defendant and, on the other hand, would facilitate and expedite prosecutions by making it possible to prosecute by information. Moreover, juries frequently are reluctant to convict any defendants if they know the potential maximum penalty is excessive, although it is seldom imposed in actual practice.

4. Miscellaneous: All 18-month imprisonment penalties were eliminated. They were increased if the nature of the offense warranted it or reduced to 1 year in order that the offense be made a misdemeanor.

Effective Date of 1984 Amendment. Pub.L. 98–596, § 10, Oct. 30, 1984, 98 Stat. 3138, provided that the amendment made by section 8 to this section shall apply to offenses committed after Dec. 31, 1984.

Short Title of 1984 Amendment. Section 200 of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 1976, provided: "This title [Title II of Pub.L. 98–473] may be cited as the 'Comprehensive Crime Control Act of 1984'."

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 550 (Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152).

Section 2(a) comprises section 550 of title 18, U.S.C., 1940 ed., without change except in minor matters of phraseology.

Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as "causes or procures".

The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who "aids, abets, counsels, commands, induces or procures" another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.

It removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

This accords with the following decisions: *Rothenburg v. United States*,1918, 38 S.Ct. 18, 245 U.S. 480, 62 L.Ed. 414, and *United States v. Hodorowicz*, C.C.A. Ill.1939, 105 F.2d 218, certiorari denied 60 S.Ct. 108, 308 U.S. 584, 84 L.Ed. 489. *United States v. Giles*, 1937, 57 S.Ct. 340, 300 U.S. 41, 81 L.Ed. 493, rehearing denied, 57 S.Ct. 505, 300 U.S. 687, 81 L.Ed. 888.

§ 3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 551 (Mar. 4, 1909, ch. 321, § 333, 35 Stat. 1152).

The first paragraph is new. It is based upon authority of *Skelly v. United States* (C.C.A.Okl.1935, 76 F.2d 483, certiorari denied, 1935, 55 S.Ct. 914, 295 U.S. 757, 79 L.Ed. 1699), where the court defined an accessory after the fact as—

one who knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon in order to hinder the felon's apprehension, trial, or punishment—

and cited Jones' Blackstone, books 3 and 4, page 2204; *U.S. v. Hartwell* (Fed. Cas. No. 15,318); *Albritton v. State* (32 Fla. 358, 13 So. 955); *State v. Davis* (14 R.I.

281); *Schleeter v. Commonwealth* (218 Ky. 72, 290 S.W. 1075). (See also *State v. Potter*, 1942, 221 N.C. 153, 19 S.E.2d 257; *Hunter v. State*, 1935, 128 Tex.Cr.R. 191, 79 S.W.2d 855; *State v. Wells*, 1940, 195 La. 754, 197 So. 419.)

The second paragraph is from section 551 of title 18, U.S.C., 1940 ed. Here only slight changes were made in phraseology.

§ 4. Misprision of felony

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 251 (Mar. 4, 1909, ch. 321, § 146, 35 Stat. 1114).

Changes in phraseology only.

§ 5. United States defined

The term "United States", as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 39, 133, 346, 381, 502, and 632, and section 40 of title 50, U.S.C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title XIII, § 1, 40 Stat. 231).

Section consolidates the first sentence of section 39, all of sections 133, 346, and 632, and the second sentences, respectively, of sections 381 and 502, all of title 18, U.S.C., 1940 ed., and section 40 of title 50, U.S.C., 1940 ed., War and National Defense, with minor changes in phraseology.

All of these sections and parts of sections were derived from section 1 of title XIII of said act of June 15, 1917. Said section 40 of title 50, U.S.C., War and National Defense, has also been retained in that title, as it still relates to some sections therein which were not transferred to this title.

The remainder of said section 39 of title 18, U.S.C., 1940 ed., which was derived from sections 2, 3, and 4 of title XIII of the act of June 15, 1917, relating to jurisdiction and other matters, is almost entirely obsolete. The provisions still in force are incorporated in section 3241 of this title.

The remaining provisions of said sections 381 and 502 of title 18, U.S.C., 1940 ed., which were derived from sources other than said section 1 of title XIII of the act of June 15, 1917, are incorporated in sections 1364 and 2275 of this title.

§ 6. Department and agency defined

As used in this title:

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

Historical and Revision Notes

This section defines the terms "department" and "agency" of the United States. The word "department" appears 57 times in title 18, U.S.C., 1940 ed., and the word "agency" 14 times. It was considered necessary to define clearly these words in order to avoid possible litigation as to the scope or coverage of a given section containing such words. (See *United States v. Germaine*, 1878, 99 U.S. 508, 25 L.Ed. 482, for definition of words "department" or "head of department.")

The phrase "corporation in which the United States has a proprietary interest" is intended to include those governmental corporations in which stock is not actually issued as well as those in which stock is owned by the United States. It excludes those corporations in which the interest of the Government is custodial or incidental.

References in Text. Section 1 of Title 5, referred to in text, was repealed and is now covered by section 101 of Title 5, U.S.C.A., Government Organization and Employees.

§ 7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(As amended July 12, 1952, c. 695, 66 Stat. 589; Dec. 21, 1981, Pub.L. 97–96, § 6, 95 Stat. 1210; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1210, 98 Stat. 2164.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 451 (Mar. 4, 1909, ch. 321, § 272, 35 Stat. 1142; June 11, 1940, ch. 323, 54 Stat. 304).

The words "The term 'special maritime and territorial jurisdiction of the United States' as used in this title includes:" were substituted for the words "The crimes and offenses defined in sections 451–468 of this title shall be punished as herein prescribed."

This section first appeared in the 1909 Criminal Code. It made it possible to combine in one chapter all the penal provisions covering acts within the admiralty and maritime jurisdiction without the necessity of repeating in each section the places covered.

The present section has made possible the allocation of the diverse provisions of chapter 11 of Title 18, U.S.C., 1940 ed., to particular chapters restricted to particular offenses, as contemplated by the alphabetical chapter arrangement.

In several revised sections of said chapter 11 the words "within the special maritime and territorial jurisdiction of the United States" have been added. Thus the jurisdictional limitation will be preserved in all sections of said chapter 11 describing an offense.

Enumeration of names of Great Lakes was omitted as unnecessary.

Other minor changes were necessary now that the section defines a term rather than the place of commission of crime or offense; however, the extent of the special jurisdiction as originally enacted has been carefully followed.

§ 8. Obligation or other security of the United States defined

The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 261 (Mar. 4, 1909, ch. 321, § 147, 35 Stat. 1115; Jan. 27, 1938, ch. 10, § 3, 52 Stat. 7).

The terms of this section were general enough to justify its inclusion in this chapter rather than retaining it in the chapter on "Counterfeiting" where the terms which it specifically defines are set out in sections 471–476, 478, 481, 483, 492, and 504 of this title.

Words "Federal Reserve notes, Federal Reserve bank notes" were inserted before "coupons" because such notes have almost supplanted national bank currency.

Minor changes were made in phraseology.

§ 9. Vessel of the United States defined

The term "vessel of the United States", as used in this title, means a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 501 (Mar. 4, 1909, ch. 321, § 310, 35 Stat. 1148).

Section is made applicable to the entire title rather than to sections 481 et seq. of title 18, U.S.C., 1940 ed.

Minor changes in phraseology were made.

§ 10. Interstate commerce and foreign commerce defined

The term "interstate commerce", as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

The term "foreign commerce", as used in this title, includes commerce with a foreign country.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 408, 408b, 414(a), and 419a(b) (Oct. 29, 1919, ch. 89, § 2(b), 41 Stat. 325; June 22, 1932, ch. 271, § 2, 47 Stat. 326; May 18, 1934, ch. 301, 48 Stat. 782; May 22, 1934, ch. 333, § 2(a), 48 Stat. 794; Aug. 18, 1941, ch. 366, § 2(b), 55 Stat. 631).

This section consolidates into one section identical definitions contained in sections 408, 408b, 414(a), and 419a(b) of title 18, U.S.C., 1940 ed.

In addition to slight improvements in style, the word "commerce" was substituted for "transportation" in order to avoid the narrower connotation of the word "transportation" since "commerce" obviously includes more than "transportation." The word "Possession" was inserted in two places to make the definition more accurate and comprehensive since the places included in the word "Possession" would normally be within the term defined and a narrower construction should be handled by express statutory exclusion in those crimes which Congress intends to restrict to commerce within the continental United States.

§ 11. Foreign government defined

The term "foreign government", as used in this title except in sections 112, 878, 970, 1116, and 1201, includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

(As amended Oct. 8, 1976, Pub.L. 94–467, § 11, 90 Stat. 2001.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 98, 288, 349; section 235 of title 22 U.S.C., 1940 ed., Foreign Relations and Intercourse; section 41 of title 50, U.S.C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title VIII, § 4, 40 Stat. 226).

The definition of "foreign government" contained in this section, with minor changes in phraseology, is from section 4 of title VIII of act June 15, 1917 (Ch. 30, 40 Stat. 217, 226), known as the Espionage Act of 1917. This definition was incorporated in sections 98, 288, and 349 of title 18 and in section 235 of title 22, Foreign Relations and Intercourse, and in section 41 of Title 50, War and National Defense, U.S.C., all in 1940 ed., since the definition was specifically enacted with reference to said sections and others not material here.

The remaining provisions of said sections 98 and 349 of title 18, U.S.C., 1940 ed., which were derived from sources other than said section 4 of title VIII of the act of June 15, 1917, are incorporated in sections 502 and 957 of this title.

§ 12. United States Postal Service defined

As used in this title, the term "Postal Service" means the United States Postal Service established under title 39, and every officer and employee of that Service, whether[1] he has taken the oath of office.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(2), 84 Stat. 777.)

[1] So in original. Probably should read "whether or not."

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 301, 360 (Mar. 4, 1909, ch. 321, §§ 230, 231, 35 Stat. 1134).

This section consolidates sections 301 and 360 of title 18, U.S.C., 1940 ed., with necessary changes in phraseology.

§ 13. Laws of States adopted for areas within Federal jurisdiction

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 468 (Mar. 4, 1909, ch. 321, § 289, 35 Stat. 1145; June 15, 1933, ch. 85, 48 Stat. 152; June 20, 1935, ch. 284, 49 Stat. 394; June 6, 1940, ch. 241, 54 Stat. 234).

Act March 4, 1909, § 289 used the words "now in force" when referring to the laws of any State, organized Territory or district, to be considered in force.

As amended on June 15, 1933, the words "by the laws thereof in force on June 1, 1933, and remaining in force at the time of the doing or omitting the doing of such act or thing, would be penal," were used.

The amendment of June 20, 1935, extended the date to "April 1, 1935," and the amendment of June 6, 1940, extended the date to "February 1, 1940".

The revised section omits the specification of any date as unnecessary in a revision, which speaks from the date of its enactment. Such omission will not only make effective within Federal reservations, the local State laws in force on the date of the enactment of the revision, but will authorize the Federal courts to apply the same measuring stick to such offenses as is applied in the adjoining State under future changes of the State law and will make unnecessary periodic pro forma amendments of this section to keep abreast of changes of local laws. In other

words, the revised section makes applicable to offenses committed on such reservations, the law of the place that would govern if the reservation had not been ceded to the United States.

The word "Possession" was inserted to clarify scope of section.

Minor changes were made in phraseology.

§ 14. Applicability to Canal Zone; definition

(a) In addition to the sections of this title which by their terms apply to and within the Canal Zone, the following sections of this title, as amended from time to time, apply to and within the Canal Zone: 6, 8, 11, 45, 201, 202, 203, 205, 207, 208, 209, 210, 211, 218, 287, 331, 371, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 505, 506, 507, 508, 509, 594, 595, 598, 600, 601, 604, 605, 608, 611, 612, 703, 752, 755, 756, 792, 793, 794, 795, 796, 797, 798, as added by section 24(a) of the Act of October 31, 1951 (chapter 655, 65 Stat. 719), 798, as added by section 4 of the Act of June 30, 1953 (chapter 175, 67 Stat. 133), 799, 915, 917, 951, 953, 954, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 1001, 1017, 1024, 1073, 1301, 1364, 1381, 1382, 1542, 1543, 1544, 1546, 1584, 1621, 1622, 1761, 1821, 1991, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2199, 2231, 2234, 2235, 2274, 2275, 2277, 2381, 2382, 2383, 2384, 2385, 2387, 2388, 2389, 2390, 2421, 2422, 2423, 2424, 3042, 3059, 3105, 3109, 3187, 3195, 3500.

(b) The term "Canal Zone", as used in the sections of this title which by their terms apply to and within the Canal Zone, and as used in subsection (a) of this section, includes the area designated as the Canal Zone by sections 1 and 2 of Title 2, Canal Zone Code; and it also includes the corridor over which the United States of America exercises jurisdiction pursuant to the provisions of Article IX of the General Treaty of Friendship and Cooperation between the United States of America and the Republic of Panama, signed March 2, 1936, to the extent that the application, to the corridor, of the sections mentioned in this subsection, and of those specified in subsection (a) of this section, is consistent with the nature of the rights of the United States in the corridor as provided by treaty.

(c) The definitions of the terms prescribed by sections 5 and 10, or other sections of this title, are modified to effectuate the applicability of the sections enumerated by subsection (a) of this section to and within the Canal Zone.

(As amended Aug. 5, 1953, c. 325, 67 Stat. 366; Oct. 18, 1962, Pub.L. 87-845, § 3(a), 76A Stat. 698; June 22, 1968, Pub.L. 90-357, § 59, 82 Stat. 248.)

References in Text. Section 608 of this title, referred to in subsec. (a), was repealed.

§ 15. Obligation or other security of foreign government defined

The term "obligation or other security of any foreign government" includes, but is not limited to, uncanceled stamps, whether or not demonetized.

(Added Pub.L. 85-921, § 3, Sept. 2, 1958, 72 Stat. 1771.)

§ 16. Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(Added Pub.L. 98-473, Title II, § 1001(a), Oct. 12, 1984, 98 Stat. 2136.)

§ 20.[1] Insanity defense

(a) **Affirmative defense.**—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) **Burden of proof.**—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(Added Pub.L. 98-473, Title II, § 402(a), Oct. 12, 1984, 98 Stat. 2057.)

[1] So in original. No sections 17 to 19 have been enacted.

CHAPTER 2—AIRCRAFT AND MOTOR VEHICLES

Sec.

31. Definitions.
32. Destruction of aircraft or aircraft facilities.
33. Destruction of motor vehicles or motor vehicle facilities.
34. Penalty when death results.
35. Imparting or conveying false information.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 31. Definitions

When used in this chapter the term—

"Aircraft engine", "air navigation facility", "appliance", "civil aircraft", "foreign air commerce",

"interstate air commerce", "landing area", "overseas air commerce", "propeller", "spare part" and "special aircraft jurisdiction of the United States" shall have the meaning ascribed to those terms in the Federal Aviation Act of 1958, as amended.

"Motor vehicle" means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo;

"Destructive substance" means any explosive substance, flammable material, infernal machine, or other chemical, mechanical, or radioactive device or matter of a combustible, contaminative, corrosive, or explosive nature;

"Used for commercial purposes" means the carriage of persons or property for any fare, fee, rate, charge or other consideration, or directly or indirectly in connection with any business, or other undertaking intended for profit;

"In flight" means any time from the moment all the external doors of an aircraft are closed following embarkation until the moment when any such door in [1] opened for disembarkation. In the case of a forced landing the flight shall be deemed to continue until competent authorities take over the responsibility for the aircraft and the persons and property on board; and

"In service" means any time from the beginning of preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight.

(Added July 14, 1956, c. 595, § 1, 70 Stat. 538, and amended Oct. 12, 1984, Pub.L. 98–473, Title II, §§ 1010, 2013(a), 98 Stat. 2141, 2187.)

[1] So in original. Probably should be "is".

References in Text. The Federal Aviation Act of 1958, referred to in text, is Pub.L. 85–726, Aug. 23, 1958, 72 Stat. 731, which is classified principally to chapter 20 (§ 1301 et seq.) of Title 49, Transportation.

Effective Date of 1984 Amendment. Section 2015 of Pub.L. 98–473, Title II, c. XX, pt. B, Oct. 12, 1984, 98 Stat. 2190, provided: "This part [part B of chapter XX of Title II of Pub.L. 98–473] shall become effective on the date of the enactment of this joint resolution [Oct. 12, 1984]."

Short Title of 1984 Amendment. Section 2011 of Pub.L. 98–473, Title II, c. XX, pt. B, Oct. 12, 1984, 98 Stat. 2187, provided: "This part [part B of chapter XX of Title II of Pub.L. 98–473] may be cited as the 'Aircraft Sabotage Act'."

Congressional Findings and Purpose. Section 2012 of Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 2187, provided: "The Congress hereby finds that—

"(1) the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (ratified by the United States on November 1, 1972) requires each contracting State to establish its jurisdiction over certain offenses affecting the safety of civil aviation;

"(2) such offenses place innocent lives in jeopardy, endanger national security, affect domestic tranquility, gravely affect interstate and foreign commerce, and are offenses against the law of nations; and

"(3) the purpose of this subtitle is to implement fully the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation and to expand the protection accorded to aircraft and related facilities."

§ 32. Destruction of aircraft or aircraft facilities

(a) Whoever willfully—

(1) sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;

(2) places or causes to be placed a destructive device or substance in, upon, or in proximity to, or otherwise makes or causes to be made unworkable or unusable or hazardous to work or use, any such aircraft, or any part or other materials used or intended to be used in connection with the operation of such aircraft, if such placing or causing to be placed or such making or causing to be made is likely to endanger the safety of any such aircraft;

(3) sets fire to, damages, destroys, or disables any air navigation facility, or interferes by force or violence with the operation of such facility, if such fire, damaging, destroying, disabling, or interfering is likely to endanger the safety of any such aircraft in flight;

(4) with the intent to damage, destroy, or disable any such aircraft, sets fire to, damages, destroys, or disables or places a destructive device or substance in, upon, or in proximity to, any appliance or structure, ramp, landing area, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any such aircraft or any cargo carried or intended to be carried on any such aircraft;

(5) performs an act of violence against or incapacitates any individual on any such aircraft, if such act of violence or incapacitation is likely to endanger the safety of such aircraft;

(6) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safety of any such aircraft in flight; or

(7) attempts to do anything prohibited under paragraphs (1) through (6) of this subsection;

shall be fined not more than $100,000 or imprisoned not more than twenty years or both.

(b) Whoever willfully—

(1) performs an act of violence against any individual on board any civil aircraft registered in a country other than the United States while such aircraft is in flight, if such act is likely to endanger the safety of that aircraft;

(2) destroys a civil aircraft registered in a country other than the United States while such aircraft is in service or causes damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight;

(3) places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight; or

(4) attempts to commit an offense described in paragraphs (1) through (3) of this subsection;

shall, if the offender is later found in the United States, be fined not more than $100,000 or imprisoned not more than twenty years, or both.

(c) Whoever willfully imparts or conveys any threat to do an act which would violate any of paragraphs (1) through (5) of subsection (a) or any of paragraphs (1) through (3) of subsection (b) of this section, with an apparent determination and will to carry the threat into execution shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(Added July 14, 1956, c. 595, § 1, 70 Stat. 539, and amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 2013(b), 98 Stat. 2187.)

Effective Date of 1984 Amendment. Amendment by Pub.L. 98–473, Title II, c. XX, § 2013(b), effective Oct. 12, 1984, see section 2015 of Pub.L. 98–473 set out as a note under section 31 of this title.

§ 33. Destruction of motor vehicles or motor vehicle facilities

Whoever willfully, with intent to endanger the safety of any person on board or anyone who he believes will board the same, or with a reckless disregard for the safety of human life, damages, disables, destroys, tampers with, or places or causes to be placed any explosive or other destructive substance in, upon, or in proximity to, any motor vehicle which is used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation; or

Whoever willfully, with like intent, damages, disables, destroys, sets fire to, tampers with, or places or causes to be placed any explosive or other destructive substance in, upon, or in proximity to any garage, terminal, structure, supply, or facility used in the operation of, or in support of the operation of, motor vehicles engaged in interstate or foreign commerce or otherwise makes or causes such property to be made unworkable, unusable, or hazardous to work or use; or

Whoever, with like intent, willfully disables or incapacitates any driver or person employed in connection with the operation or maintenance of the motor vehicle, or in any way lessens the ability of such person to perform his duties as such; or

Whoever willfully attempts to do any of the aforesaid acts—

shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(Added July 14, 1956, c. 595, § 1, 70 Stat. 540.)

§ 34. Penalty when death results

Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.

(Added July 14, 1956, c. 595, § 1, 70 Stat. 540.)

§ 35. Imparting or conveying false information

(a) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title shall be subject to a civil penalty of not more than $1,000 which shall be recoverable in a civil action brought in the name of the United States.

(b) Whoever willfully and maliciously, or with reckless disregard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—shall be

fined not more than $5,000, or imprisoned not more than five years, or both.

(Added July 14, 1956, c. 595, § 1, 70 Stat. 540, and amended Oct. 3, 1961, Pub.L. 87–338, 75 Stat. 751; July 7, 1965, Pub.L. 89–64, 79 Stat. 210.)

CHAPTER 3—ANIMALS, BIRDS, FISH, AND PLANTS

Sec.

41. Hunting, fishing, trapping; disturbance or injury on wildlife refuges.
42. Importation or shipment of injurious mammals, birds, fish (including mollusks and crustacea), amphibia, and reptiles; permits, specimens for museums; regulations.
43. Transportation of wildlife taken in violation of State, National, or foreign laws; receipt; making false records [1].
44. Marking packages or containers [1].
45. Capturing or killing carrier pigeons.
46. Transportation of water hyacinths.
47. Use of aircraft or motor vehicles to hunt certain wild horses or burros [2].

[1] Sections were repealed by Pub.L. 97–79 without striking out items 43 and 44 from the analysis of sections.

[2] So in original. Does not conform to section catchline.

Historical and Revision Notes

The criminal provisions of the Migratory Bird Treaty Act, sections 703–711 of title 16, U.S.C., 1940 ed., Conservation, and the Migratory Bird Conservation Act, sections 715–715r of title 16, U.S.C., 1940 ed., Conservation, were considered for inclusion in this chapter. Since these provisions, except parts of sections 704–707 of said title 16, are so inextricably interwoven with the Migratory Bird Acts, it was found advisable to exclude them.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 41. Hunting, fishing, trapping; disturbance or injury on wildlife refuges

Whoever, except in compliance with rules and regulations promulgated by authority of law, hunts, traps, captures, willfully disturbs or kills any bird, fish, or wild animal of any kind whatever, or takes or destroys the eggs or nest of any such bird or fish, on any lands or waters which are set apart or reserved as sanctuaries, refuges or breeding grounds for such birds, fish, or animals under any law of the United States or willfully injures, molests, or destroys any property of the United States on any such lands or waters, shall be fined not more than $500 or imprisoned not more than six months, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 145 and §§ 676, 682, 683, 685, 688, 689b, 692a, and 694a of title 16, U.S.C., 1940 ed., Conservation (Jan. 24, 1905, ch. 137, § 2, 33 Stat. 614; June 29, 1906, ch. 3593, § 2, 34 Stat. 607; Mar. 4, 1909, ch. 321, § 84, 35 Stat. 1104; Aug. 11, 1916, ch. 313, 39 Stat. 476; June 5, 1920, ch. 247, § 2, 41 Stat. 986; Apr. 15, 1924, ch. 108, 43 Stat. 98; Feb. 28, 1925, ch. 376, 43 Stat. 1091; July 3, 1926, ch. 744, § 6, 44 Stat. 821; July 3, 1926, ch. 776, § 3, 44 Stat. 889; June 28, 1930, ch. 709, § 2, 46 Stat. 828; Mar. 10, 1934, ch. 54, § 2, 48 Stat. 400; Reorg. Plan No. II, § 4(f), 4 F.R. 2731, 53 Stat. 1433).

This revised section condenses, consolidates, and simplifies similar provisions of sections 676, 682, 683, 685, 688, 689b, 692a, and 694a of title 16, U.S.C., 1940 ed., with section 145 of title 18, U.S.C., 1940 ed., with such changes of phraseology as make clear the intent of Congress to protect all wildlife within Federal sanctuaries, refuges, fish hatcheries, and breeding grounds. Irrelevant provisions of such sections in title 16 are to be retained in that title.

Because of the general nature of this consolidated section, no specific reference is made to rules and regulations issued by the Secretary of the Interior or any other personage, but only to rules and regulations "promulgated by authority of law".

The punishment provided by the sections consolidated varied from a fine not exceeding $100 or imprisonment not exceeding 6 months, or both, in section 694a of title 16, U.S.C., 1940 ed., to a fine not exceeding $1,000 or imprisonment not exceeding 1 year, or both, in sections 676, 685, and 688 of such title 16. The revised section adopts the punishment provisions of the other five sections.

The references to "misdemeanor" in sections 676, 685, 688, 689b, 692a, and 694a of title 16, U.S.C., 1940 ed., were omitted as unnecessary in view of definition of "misdemeanor" in section 1 of this title, and also to conform with policy followed by codifiers of the 1909 Criminal Code, as stated in Senate Report 10, part 1, pages 12, 13, 14, Sixtieth Congress, first session, to accompany S. 2982.

Words "upon conviction", contained in sections 676, 685, 688, 689b, 692a, and 694a of title 16, U.S.C., 1940 ed., were omitted as surplusage, because punishment can be imposed only after conviction.

Words "in any United States court of competent jurisdiction", in sections 676, 685, and 688 of title 16, U.S.C., 1940 ed., words "in any United States court", in sections 689b, 692a, and 694a of such title 16, and words "in the discretion of the court", in said sections 676, 685, 688, and 689b, were likewise omitted as surplusage.

§ 42. Importation or shipment of injurious mammals, birds, fish (including mollusks and crustacea), amphibia, and reptiles; permits, specimens for museums; regulations

(a)(1) The importation into the United States, any territory of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or any shipment between the continental United States, the District

of Columbia, Hawaii, the Commonwealth of Puerto Rico, or any possession of the United States, of the mongoose of the species Herpestes auropunctatus; of the species of so-called "flying foxes" or fruit bats of the genus Pteropus; and such other species of wild mammals, wild birds, fish (including mollusks and crustacea), amphibians, reptiles, or the offspring or eggs of any of the foregoing which the Secretary of the Interior may prescribe by regulation to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States, is hereby prohibited. All such prohibited mammals, birds, fish (including mollusks and crustacea), amphibians, and reptiles, and the eggs or offspring therefrom, shall be promptly exported or destroyed at the expense of the importer or consignee. Nothing in this section shall be construed to repeal or modify any provision of the Public Health Service Act or Federal Food, Drug, and Cosmetic Act. Also, this section shall not authorize any action with respect to the importation of any plant pest as defined in the Federal Plant Pest Act, insofar as such importation is subject to regulation under that Act.

(2) As used in this subsection, the term "wild" relates to any creatures that, whether or not raised in captivity, normally are found in a wild state; and the terms "wildlife" and "wildlife resources" include those resources that comprise wild mammals, wild birds, fish (including mollusks and crustacea), and all other classes of wild creatures whatsoever, and all types of aquatic and land vegetation upon which such wildlife resources are dependent.

(3) Notwithstanding the foregoing, the Secretary of the Interior, when he finds that there has been a proper showing of responsibility and continued protection of the public interest and health, shall permit the importation for zoological, educational, medical, and scientific purposes of any mammals, birds, fish (including mollusks and crustacea), amphibia, and reptiles, or the offspring or eggs thereof, where such importation would be prohibited otherwise by or pursuant to this Act, and this Act shall not restrict importations by Federal agencies for their own use.

(4) Nothing in this subsection shall restrict the importation of dead natural-history specimens for museums or for scientific collections, or the importation of domesticated canaries, parrots (including all other species of psittacine birds), or such other cage birds as the Secretary of the Interior may designate.

(5) The Secretary of the Treasury and the Secretary of the Interior shall enforce the provisions of this subsection, including any regulations issued hereunder, and, if requested by the Secretary of the Interior, the Secretary of the Treasury may require the furnishing of an appropriate bond when desirable to insure compliance with such provisions.

(b) Whoever violates this section, or any regulation issued pursuant thereto, shall be fined not more than $500 or imprisoned not more than six months, or both.

(c) The Secretary of the Interior within one hundred and eighty days of the enactment of the Lacey Act Amendments of 1981 shall prescribe such requirements and issue such permits as he may deem necessary for the transportation of wild animals and birds under humane and healthful conditions, and it shall be unlawful for any person, including any importer, knowingly to cause or permit any wild animal or bird to be transported to the United States, or any Territory or district thereof, under inhumane or unhealthful conditions or in violation of such requirements. In any criminal prosecution for violation of this subsection and in any administrative proceeding for the suspension of the issuance of further permits—

(1) the condition of any vessel or conveyance, or the enclosures in which wild animals or birds are confined therein, upon its arrival in the United States, or any Territory or district thereof, shall constitute relevant evidence in determining whether the provisions of this subsection have been violated; and

(2) the presence in such vessel or conveyance at such time of a substantial ratio of dead, crippled, diseased, or starving wild animals or birds shall be deemed prima facie evidence of the violation of the provisions of this subsection.

(As amended May 24, 1949, c. 139, § 2, 63 Stat. 89; Sept. 2, 1960, Pub.L. 86–702, § 1, 74 Stat. 753; Nov. 16, 1981, Pub.L. 97–79, § 9(d), 95 Stat. 1079.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 391, 394 (Mar. 4, 1909, ch. 321, §§ 241, 244, 35 Stat. 1137, 1138; June 15, 1935, ch. 261, title II, § 201, 49 Stat. 381; Reorg. Plan No. II, § 4(f), 4 F.R. 2731, 53 Stat. 1433).

This section consolidates the provisions of sections 391 and 394 of title 18, U.S.C., 1940 ed., as subsections (a) and (b), respectively.

In subsection (a) the words "Territory or District thereof" were omitted as unnecessary in view of the definition of the United States in section 5 of this title.

In subsection (b) the words "upon conviction thereof", were omitted as surplusage because punishment can only be imposed after conviction.

The amount of the fine was reduced from $1,000 to $500, thus making the violation a petty offense as defined

in section 1 of this title. (See also section 41 of this title which provides a similar punishment.)

Minor verbal changes were also made.

1949 ACT

This section [section 2] incorporates in section 42 of title 18, U.S.C., with slight changes in phraseology, the provisions of act of June 29, 1948 (ch. 716, 62 Stat. 1096), which became law subsequent to the enactment of the revision of title 18.

References in Text. The Public Health Service Act, referred to in subsec. (a)(1), is classified to section 201 et seq. of Title 42, U.S.C.A., The Public Health and Welfare.

The Federal Food, Drug and Cosmetic Act, referred to in subsec. (a)(1), is classified to section 301 et seq. of Title 21, U.S.C.A., Food and Drugs.

The Federal Plant Pest Act, referred to in subsec. (a)(1), is classified to section 150aa et seq. of Title 7, U.S.C.A., Agriculture.

This Act, referred to in subsec. (a) (3), probably refers to Pub.L. 86–702, which amended this section and section 43 of this title.

The Lacey Act Amendments of 1981, referred to in subsec. (c), is Pub.L. 97–79, which was enacted Nov. 16, 1981.

[§§ 43, 44. Repealed. Pub.L. 97–79, § 9(b)(2), Nov. 16, 1981, 95 Stat. 1079]

§ 45. Capturing or killing carrier pigeons

Whoever knowingly traps, captures, shoots, kills, possesses, or detains an Antwerp or homing pigeon, commonly called carrier pigeon, owned by the United States or bearing a band owned and issued by the United States having thereon the letters "U.S.A." or "U.S.N." and a serial number, shall be fined not more than $100 or imprisoned not more than six months, or both.

The possession or detention of any such pigeon without giving immediate notice by registered mail to the nearest military or naval authorities, shall be prima facie evidence of a violation of this section.

HISTORICAL AND REVISION NOTES

Based on sections 111, 112, and 113 of title 50, U.S.C., 1940 ed., War and National Defense (Apr. 19, 1918, ch. 58, §§ 1, 2, 3, 40 Stat. 533).

Section consolidates sections 111, 112, and 113 of title 50, U.S.C., 1940 ed., War and National Defense.

Words "upon conviction" were deleted as surplusage because punishment can only be imposed after conviction.

Other changes in phraseology also were made.

§ 46. Transportation of water hyacinths

(a) Whoever knowingly delivers or receives for transportation, or transports, in interstate commerce, alligator grass (alternanthera philoxeroides), or water chestnut plants (trapa natans) or water hyacinth plants (eichhornia crassipes) or the seeds of such grass or plants; or

(b) Whoever knowingly sells, purchases, barters, exchanges, gives, or receives any grass, plant, or seed which has been transported in violation of subsection (a); or

(c) Whoever knowingly delivers or receives for transportation, or transports, in interstate commerce, an advertisement, to sell, purchase, barter, exchange, give, or receive alligator grass or water chestnut plants or water hyacinth plants or the seeds of such grass or plants—

shall be fined not more than $500, or imprisoned not more than six months, or both.

(Added Aug. 1, 1956, c. 825, § 1, 70 Stat. 797.)

§ 47. Use of aircraft or motor vehicles to hunt certain wild horses or burros; pollution of watering holes

(a) Whoever uses an aircraft or a motor vehicle to hunt, for the purpose of capturing or killing, any wild unbranded horse, mare, colt, or burro running at large on any of the public land or ranges shall be fined not more than $500, or imprisoned not more than six months, or both.

(b) Whoever pollutes or causes the pollution of any watering hole on any of the public land or ranges for the purpose of trapping, killing, wounding, or maiming any of the animals referred to in subsection (a) of this section shall be fined not more than $500, or imprisoned not more than six months, or both.

(c) As used in subsection (a) of this section—

(1) The term "aircraft" means any contrivance used for flight in the air; and

(2) The term "motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land.

(Added Pub.L. 86–234, § 1(a), Sept. 8, 1959, 73 Stat. 470.)

CHAPTER 5—ARSON

Sec.

81. Arson within special maritime and territorial jurisdiction.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 81. Arson within special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and

maliciously sets fire to or burns, or attempts to set fire to or burn any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

If the building be a dwelling or if the life of any person be placed in jeopardy, he shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 464, 465 (Mar. 4, 1909, ch. 321, §§ 285, 286, 35 Stat. 1144).

Sections were consolidated and rewritten both as to form and substance and that part of each section relating to destruction of property by means other than burning constitutes section 1363 of this title.

The words "within the maritime and territorial jurisdiction of the United States" were added to preserve existing limitations of territorial applicability. (See section 7 of this title and note thereunder).

The phrase "any building, structure, or vessel, any machinery or building materials and supplies, military or naval stores, munitions of war or any structural aids or appliances for navigation or shipping" was substituted for "any dwelling house, or any store, barn, stable, or other building, parcel of a dwelling house", in section 464 of title 18, U.S.C., 1940 ed., and "any arsenal, armory, magazine, rope walk, ship house, warehouse, blockhouse, or barrack, or any storehouse, barn or stable, not parcel of a dwelling house, or any other building not mentioned in the section last preceding, or any vessel, built, building, or undergoing repair, or any lighthouse, or beacon, or any machinery, timber, cables, rigging, or other materials or appliances for building, repairing or fitting out vessels, or any pile of wood, boards, or other lumber, or any military, navel or victualing stores, arms, or other munitions of war", in section 465 of title 18, U.S.C., 1940 ed. The substituted phrase is a concise and comprehensive description of the things enumerated in both sections.

The punishment provisions are new and are graduated with some regard to the gravity of the offense. It was felt that a possible punishment of 20 years for burning a wood pile or injuring or destroying an outbuilding was disproportionate and not in harmony with recent legislation.

CHAPTER 7—ASSAULT

Sec.

111. Assaulting, resisting, or impeding certain officers or employees.
112. Protection of foreign officials, official guests, and internationally protected persons.
113. Assaults within maritime and territorial jurisdiction.
114. Maiming within maritime and territorial jurisdiction.
115. Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 111. Assaulting, resisting, or impeding certain officers or employees

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 118, 254 (Mar. 4, 1909, ch. 321, § 62, 35 Stat. 1100; May 18, 1934, ch. 299, § 2, 48 Stat. 781).

This section consolidates sections 118 and 254 with changes in phraseology and substance necessary to effect the consolidation.

Also the words "Bureau of Animal Industry of the Department of Agriculture" appearing in section 118 of title 18, U.S.C., 1940 ed., were inserted in enumeration of Federal officers and employees in section 1114 of this title.

The punishment provision of section 254 of title 18, U.S.C., 1940 ed., was adopted as the latest expression of Congressional intent. This consolidation eliminates a serious incongruity in punishment and application.

§ 112. Protection of foreign officials, official guests, and internationally protected persons

(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) Whoever willfully—

(1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs

a foreign official in the performance of his duties;

(2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties; or

(3) within the United States but outside the District of Columbia and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for diplomatic, consular, or residential purposes by—

(A) a foreign government, including such use as a mission to an international organization;

(B) an international organization;

(C) a foreign official; or

(D) an official guest;

congregates with two or more other persons with intent to violate any other provision of this section;

shall be fined not more than $500 or imprisoned not more than six months, or both.

(c) For the purpose of this section "foreign government", "foreign official", "internationally protected person", "international organization", and "official guest" shall have the same meanings as those provided in section 1116(b) of this title.

(d) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(38)).

(f) In the course of enforcement of subsection (a) and any other sections prohibiting a conspiracy or attempt to violate subsection (a), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary, notwithstanding.

(As amended Aug. 27, 1964, Pub.L. 88–493, § 1, 78 Stat. 610; Oct. 24, 1972, Pub.L. 92–539, Title III, § 301, 86 Stat. 1072; Oct. 8, 1976, Pub.L. 94–467, § 5, 90 Stat. 1999; Nov. 9, 1977, Pub.L. 95–163, § 17(b)(1), 91 Stat. 1286; Oct. 24, 1978, Pub.L. 95–504, § 2(b), 92 Stat. 1705.)

HISTORICAL AND REVISION NOTES

Based on section 255 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (R.S. § 4062).

Punishment provision was rewritten to make it more definite by substituting a maximum of $5,000 in lieu of the words "fined at the discretion of the court." As thus revised this provision conforms with the first punishment provision of section 111 of this title. So, also, the greater punishment provided by the second paragraph of section 111 was added to this section for offenses involving the use of dangerous weapons.

State and Local Laws Not Superseded. Section 10 of Pub.L. 94–467 provided that: "Nothing contained in this Act [Pub.L. 94–467] shall be construed to indicate an intent on the part of Congress to occupy the field in which its provisions operate to the exclusion of the laws of any State, Commonwealth, territory, possession, or the District of Columbia, on the same subject matter, nor to relieve any person of any obligation imposed by any law of any State, Commonwealth, territory, possession, or the District of Columbia, including the obligation of all persons having official law enforcement powers to take appropriate action, such as effecting arrests, for Federal as well as non-Federal violations."

Congressional Findings and Declaration of Policy. Section 2 of Pub.L. 92–539 provided that:

"The Congress recognizes that from the beginning of our history as a nation, the police power to investigate, prosecute, and punish common crimes such as murder, kidnaping, and assault had resided in the several States, and that such power should remain with the States.

"The Congress finds, however, that harassment, intimidation, obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States or against official guests of the United States adversely affect the foreign relations of the United States.

"Accordingly, this legislation is intended to afford the United States jurisdiction concurrent with that of the several States to proceed against those who by such acts interfere with its conduct of foreign affairs."

Federal Preemption. Section 3 of Pub.L. 92–539 provided that "Nothing contained in this Act shall be construed to indicate an intent on the part of Congress to occupy the field in which its provisions operate to the exclusion of the laws of any State, Commonwealth, territory, possession, or the District of Columbia on the same subject matter, nor to relieve any person of any obligation imposed by any law of any State, Commonwealth, territory, possession, or the District of Columbia."

Immunity from Criminal Prosecution. Section 5 of Pub.L. 88–493 provided that: "Nothing contained in this Act [Pub.L. 88–493] shall create immunity from criminal prosecution under any laws in any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia."

§ 113. Assaults within maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(a) Assault with intent to commit murder or rape, by imprisonment for not more than twenty years.

(b) Assault with intent to commit any felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years, or both.

(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.

(d) Assault by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both.

(e) Simple assault, by fine of not more than $300 or imprisonment for not more than three months, or both.

(f) Assault resulting in serious bodily injury, by fine of not more than $10,000 or imprisonment for not more than ten years, or both.

(As amended May 29, 1976, Pub.L. 94–297, § 3, 90 Stat. 585.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 455 (Mar. 4, 1909, ch. 321, § 276, 35 Stat. 1143).

Opening paragraph was added to preserve the jurisdictional limitation provided for by section 451 of title 18, U.S.C., 1940 ed., now section 7 of this title. (See reviser's note thereunder.)

Phraseology was simplified.

§ 114. Maiming within maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, and with intent to maim or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or

Whoever, within the special maritime and territorial jurisdiction of the United States, and with like intent, throws or pours upon another person, any scalding water, corrosive acid, or caustic substance—

Shall be fined not more than $25,000 and imprisoned not more than twenty years, or both.

(As amended May 24, 1949, c. 139, § 3, 63 Stat. 90; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1009A, 98 Stat. 2141.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 462 (Mar. 4, 1909, ch. 321, § 283, 35 Stat. 1144).

The words "within the special maritime and territorial jurisdiction of the United States, and" were added to preserve jurisdictional limitation provided for by section 451 of title 18, U.S.C., 1940 ed., now section 7 of this title. (See reviser's note thereunder.)

Changes in phraseology were made.

1949 ACT

This section [section 3] corrects a typographical error in section 114 of title 18, U.S.C.

§ 115. Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member

(a) Whoever assaults, kidnaps, or murders, or attempts to kidnap or murder, or threatens to assault, kidnap or murder a member of the immediate family of a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114, as amended, with intent to impede, intimidate, interfere with, or retaliate against such official, judge or law enforcement officer while he is engaged in or on account of the performance of his official duties, shall be punished as provided in subsection (b).

(b)(1) An assault in violation of this section shall be punished as provided in section 111 of this title.

(2) A kidnaping or attempted kidnaping in violation of this section shall be punished as provided in section 1201 of this title.

(3) A murder or attempted murder in violation of this section shall be punished as provided in sections 1111 and 1113 of this title.

(4) A threat made in violation of this section shall be punished by a fine of not more than $5,000 or imprisonment for a term of not more than five years, or both, except that imprisonment for a threatened assault shall not exceed three years.

(c) As used in this section, the term—

(1) "Federal law enforcement officer" means any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of Federal criminal law;

(2) "immediate family member" of an individual means—

(A) his spouse, parent, brother or sister, child or person to whom he stands in loco parentis; or

(B) any other person living in his household and related to him by blood or marriage;

(3) "United States judge" means any judicial officer of the United States, and includes a jus-

tice of the Supreme Court and a United States magistrate; and

(4) "United States official" means the President, President-elect, Vice President, Vice President-elect, a Member of Congress, a member-elect of Congress, a member of the executive branch who is the head of a department listed in 5 U.S.C. 101, or the Director of The Central Intelligence Agency.

(Added Pub.L. 98–473, Title II, § 1008(a), Oct. 12, 1984, 98 Stat. 2140.)

CHAPTER 9—BANKRUPTCY

Sec.
151. Definition.
152. Concealment of assets; false oaths and claims; bribery.
153. Embezzlement by trustee or officer.
154. Adverse interest and conduct of officers.
155. Fee agreements in cases under title 11 and receiverships.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 151. Definition

As used in this chapter, the term "debtor" mean [1] a debtor concerning whom a petition has been filed under title 11.

(As amended Nov. 6, 1978, Pub.L. 95–598, Title III, § 314(b)(1), 92 Stat. 2676.)

[1] So in original.

HISTORICAL AND REVISION NOTES

Based on section 52(f) of title 11, U.S.C., 1940 ed., Bankruptcy (July 1, 1898, ch. 541, § 29f as added June 22, 1938, ch. 575, § 1, 52 Stat. 857).

Definition of "bankruptcy" was added to avoid repetitious references to said title 11.

Minor changes in phraseology was [sic] made.

§ 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11; or

Whoever knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty or [1] perjury as permitted under section 1746 of title 28, United States Code, in or in relation to any case under title 11; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under title 11; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a debtor; or

Whoever, after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court entitled to its possession, any recorded information, including books, documents, records, and papers, relating to the property or financial affairs of a debtor.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended June 12, 1960, Pub.L. 86–519, § 2, 74 Stat. 217; Sept. 2, 1960, Pub.L. 86–701, 74 Stat. 753; Oct. 18, 1976, Pub.L. 94–550, § 4, 90 Stat. 2535; Nov. 6, 1978, Pub.L. 95–598, Title III, § 314(a), (c), 92 Stat. 2676, 2677.)

[1] So in original.

HISTORICAL AND REVISION NOTES

Based on section 52(b) of title 11, U.S.C., 1940 ed., Bankruptcy (July 1, 1898, ch. 541, § 29b, 30 Stat. 554; May 27, 1926, ch. 406, § 11 (part), 44 Stat. 665; June 22, 1938, ch. 575, § 1 (part), 52 Stat. 855).

Section was broadened to apply to one who gives or offers a bribe.

Minor changes were made in phraseology.

§ 153. Embezzlement by trustee or officer

Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers

any property or secretes or destroys any document belonging to the estate of a debtor which came into his charge as trustee, custodian, marshal, or other officer of the court, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Nov. 6, 1978, Pub.L. 95–598, Title III, § 314(a)(1), (d)(1), (2), 92 Stat. 2676, 2677.)

HISTORICAL AND REVISION NOTES

Based on section 52(a) of title 11, U.S.C., 1940 ed., Bankruptcy (July 1, 1898, ch. 541, § 29a, 30 Stat. 554; May 27, 1926, ch. 406, § 11 (part), 44 Stat. 665; June 22, 1938, ch. 575, § 1 (part), 52 Stat. 855).

Minor changes were made in phraseology.

§ 154. Adverse interest and conduct of officers

Whoever, being a custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a case under title 11; or

Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so—

Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant.

(As amended Nov. 6, 1978, Pub.L. 95–598, Title III, § 314(a)(2), (e)(1), (2), 92 Stat. 2676, 2677.)

HISTORICAL AND REVISION NOTES

Based on section 52(c) of title 11, U.S.C., 1940 ed., Bankruptcy (July 1, 1898, ch. 541, § 29c, 30 Stat. 554; June 22, 1938, ch. 575, § 1 (part), 52 Stat. 856).

Minor changes were made in phraseology.

§ 155. Fee agreements in cases under title 11 and receiverships

Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(As amended May 24, 1949, c. 139, § 4, 63 Stat. 90; Nov. 6, 1978, Pub.L. 95–598, Title III, § 314(f)(1), (2), 92 Stat. 2677.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on section 572a of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Aug. 25, 1937, ch. 777, 50 Stat. 810.)

Words "upon conviction" were deleted as surplusage since punishment can be imposed only after a conviction.

A fine of "$5,000" was substituted for "$10,000" and "one year" for "five years", to reduce the offense to the grade of a misdemeanor and the punishment to an amount and term proportionate to the gravity of the offense.

Minor changes were made in phraseology.

1949 ACT

This amendment [see section 4] clarifies section 155 of title 18, U.S.C., by restating the first paragraph thereof in closer conformity with the original law, as it existed at the time of the enactment of the revision of title 18.

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

Sec.
201. Bribery of public officials and witnesses.
202. Definitions.
203. Compensation of Members of Congress, officers and others, in matters affecting the Government.[1]
204. Practice in Court of Claims [1] by Members of Congress.
205. Activities of officers and employees in claims against and other matters affecting the Government.
206. Exemption of retired officers of the uniformed services.
207. Disqualification of former officers and employees; disqualification of partners of current officers and employees.
208. Acts affecting a personal financial interest.
209. Salary of Government officials and employees payable only by United States.
210. Offer to procure appointive public office.
211. Acceptance or solicitation to obtain appointive public office.
212. Offer of loan or gratuity to bank examiner.
213. Acceptance of loan or gratuity by bank examiner.
214. Offer for procurement of Federal Reserve bank loan and discount of commercial paper.
215. Receipt of commissions or gifts for procuring loans.
[216. Repealed.]
217. Acceptance of consideration for adjustment of farm indebtedness.

Sec.
218. Voiding transactions in violation of chapter; recovery by the United States.
219. Officers and employees acting as agents of foreign principals.
[220 to 222. Redesignated.]
[223. Repealed.]
224. Bribery in sporting contests.

[1] Heading of section amended without amending analysis.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

(d) Whoever, directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; or

(e) Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for

himself for or because of any official act performed or to be performed by him; or

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom; or

(i) Whoever, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of the testimony under oath or affirmation given or to be given by him as a witness upon any such trial, hearing, or other proceeding, or for or because of his absence therefrom—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(j) Subsections (d), (e), (h), and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(k) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1119, and amended Pub.L. 91–405, Title II, § 204(d)(1), Sept. 22, 1970, 84 Stat. 853.)

Prior Provisions. A prior section 201, Act June 25, 1948, c. 645, 62 Stat. 691, which prescribed penalties for anyone who offered or gave anything of value to an officer or other person to influence his decisions, was eliminated in the general amendment of this chapter by Pub.L. 87–849, and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in former sections 201 to 213 of this title prior to Pub.L. 87–849.

Executive Order No. 11222

May 8, 1965, 30 F.R. 6469, as amended by Ex.Ord.No. 11590, Apr. 23, 1971, 36 F.R. 7831.

STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

By virtue of the authority vested in me by Section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, it is hereby ordered as follows:

PART I—POLICY

Section 101. Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

PART II—STANDARDS OF CONDUCT

Section 201. (a) Except in accordance with regulations issued pursuant to subsection (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

(c) It is the intent of this section that employees avoid any action, whether or not specifically prohibited by subsection (a), which might result in, or create the appearance of—

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government.

Sec. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

Sec. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment. Aside from these restrictions, employees are free to engage in lawful financial transactions to the same extent as private citizens. Agencies may, however, further restrict such transactions in the light of the special circumstances of their individual missions.

Sec. 204. An employee shall not use Federal property of any kind for other than officially approved activities. He must protect and conserve all Federal property, including equipment and supplies, entrusted or issued to him.

Sec. 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

Sec. 206. An employee is expected to meet all just financial obligations, especially those—such as Federal, State, or local taxes—which are imposed by law.

PART III—STANDARDS OF ETHICAL CONDUCT FOR SPECIAL GOVERNMENT EMPLOYEES

Section 301. This part applies to all "special Government employees" as defined in Section 202 of Title 18 of the United States Code [section 202 of this title], who are employed in the Executive Branch.

Sec. 302. A consultant, adviser or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.

Sec. 303. A consultant, adviser, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations or suggestions to others, including particularly those with whom he has family, business, or financial ties.

Sec. 304. An adviser, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

Sec. 305. An adviser, consultant, or other special Government employee shall not receive or solicit from persons having business with his agency anything of value as a gift, gratuity, loan of favor for himself or persons with whom he has family, business, or financial ties while employed by the government or in connection with his work with the government.

Sec. 306. Each agency shall, at the time of employment of a consultant, adviser, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local governmental organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, owner, director, trustee, adviser, or consultant. In addition, it shall list such other financial information as the appointing department or agency shall decide is relevant in the light of the duties the appointee is to perform. The appointee may, but need not, be required to reveal precise amounts of investments. The statement shall be kept current throughout the period during which the employee is on the Government rolls.

PART IV—REPORTING OF FINANCIAL INTERESTS

Section 401. (a) Not later than ninety days after the date of this order, the head of each agency, each Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, and each full-time member of a committee, board, or commission appointed by the President, shall submit to the Chairman of the Civil Service Commission a statement containing the following:

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions—

(A) with which he is connected as an employee, officer, owner, director, trustee, partner, adviser, or consultant; or

(B) in which he has any continuing financial interests, through a pension or retirement plan, shared income, or otherwise, as a result of any current or prior employment or business or professional association; or

(C) in which he has any financial interest through the ownership of stocks, bonds, or other securities.

(2) A list of the names of his creditors, other than those to whom he may be indebted by reason of a mortgage on property which he occupies as a personal residence or to whom he may be indebted for current and ordinary household and living expenses.

(3) A list of his interests in real property or rights in lands, other than property which he occupies as a personal residence.

(b) Each person who enters upon duty after the date of this order in an office or position as to which a statement is required by this section shall submit such statement not later than thirty days after the date of his entrance on duty.

(c) Each statement required by this section shall be kept up to date by submission of amended statements of any changes in, or additions to, the information required to be included in the original statement, on a quarterly basis.

Sec. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the

submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

Sec. 403. (a) The interest of a spouse, minor child, or other member of his immediate household shall be considered to be an interest of a person required to submit a statement by or pursuant to this part.

(b) In the event any information required to be included in a statement required by or pursuant to this part is not known to the person required to submit such statement but is known to other persons, the person concerned shall request such other persons to submit the required information on his behalf.

(c) This part shall not be construed to require the submission of any information relating to any person's connection with, or interest in, any professional society or any charitable, religious, social, fraternal, educational, recreational, public service, civic, or political organization or any similar organization not conducted as a business enterprise and which is not engaged in the ownership or conduct of a business enterprise.

Sec. 404. The Chairman of the Civil Service Commission shall report to the President any information contained in statements required by Section 401 of this part which may indicate a conflict between the financial interests of the official concerned and the performance of his services for the Government. The Commission shall report, or by regulation require reporting, to the head of the agency concerned any information contained in statements submitted pursuant to regulations issued under Section 402 of this part which may indicate a conflict between the financial interests of the officer or employee concerned and the performance of his services for the Government.

Sec. 405. The statements and amended statements required by or pursuant to this part shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission or the head of the agency concerned may determine for good cause shown.

Sec. 406. The statements and amended statements required by or pursuant to this part shall be in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, regulation, or order. The submission of a statement or amended statements required by or pursuant to this part shall not be deemed to permit any person to participate in any matter in which his participation is prohibited by law, regulation, or order.

PART V—DELEGATING AUTHORITY OF THE PRESIDENT UNDER SECTIONS 205 AND 208 OF TITLE 18 OF THE UNITED STATES CODE RELATING TO CONFLICTS OF INTEREST

Section 501. As used in this part, "department" means an executive department, "agency" means an independent agency or establishment or a Government corporation, and "head of an agency" means, in the case of an agency headed by more than one person, the chairman or comparable member of such agency.

Sec. 502. There is delegated, in accordance with and to the extent prescribed in Sections 503 and 504 of this part, the authority of the President under Sections 205 and 208(b) of Title 18, United States Code [sections 205 and 208(b) of this title], to permit certain actions by an officer or employee of the Government, including a special Government employee, for appointment to whose position the President is responsible.

Sec. 503. Insofar as the authority of the President referred to in Section 502 extends to any appointee of the President subordinate to or subject to the chairmanship of the head of a department or agency, it is delegated to such department or agency head.

Sec. 504. Insofar as the authority of the President referred to in Section 502 extends to an appointee of the President who is within or attached to a department or agency for purposes of administration, it is delegated to the head of such department or agency.

Sec. 505. Notwithstanding any provision of the preceding sections of this part to the contrary, this part does not include a delegation of the authority of the President referred to in Section 502 insofar as it extends to:

(a) The head of any department or agency in the Executive Branch;

(b) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that Office; and

(c) Presidential appointees to committees, boards, commissions, or similar groups established by the President.

PART VI—PROVIDING FOR THE PERFORMANCE BY THE CIVIL SERVICE COMMISSION OF CERTAIN AUTHORITY VESTED IN THE PRESIDENT BY SECTION 1753 OF THE REVISED STATUTES

Section 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) [now covered by sections 3301 and 7301 of Title 5, Government Organization and Employees] as relates to establishing regulations for the conduct of persons in the civil service.

Sec. 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

PART VII—GENERAL PROVISIONS

Section 701. The Civil Service Commission is authorized and directed, in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

Sec. 702. Each agency head is hereby directed to supplement the standards provided by law, by this order, and by regulations of the Civil Service Commission with regulations of special applicability to the particular functions and activities of his agency. Each agency head is also directed to assure (1) the widest possible distribution of

regulations issued pursuant to this section, and (2) the availability of counseling for those employees who request advice or interpretation.

Sec. 703. The following are hereby revoked:

(a) Executive Order No. 10939 of May 5, 1961.

(b) Executive Order No. 11125 of October 29, 1963.

(c) Section 2(a) of Executive Order No. 10530 of May 10, 1954.

(d) White House memorandum of July 20, 1961, on "Standards of Conduct for Civilian Employees."

(e) The President's Memorandum of May 2, 1963, "Preventing Conflicts of Interest on the Part of Special Government Employees." The effective date of this revocation shall be the date of issuance by the Civil Service Commission of regulations under Section 701(a) of this order.

Sec. 704. All actions heretofore taken by the President or by his delegates in respect of the matters affected by this order and in force at the time of the issuance of this order, including any regulations prescribed or approved by the President or by his delegates in respect of such matters shall, except as they may be inconsistent with the provisions of this order or terminate by operation of law, remain in effect until amended, modified, or revoked pursuant to the authority conferred by this order.

Sec. 705. As used in this order, and except as otherwise specifically provided herein, the term "agency" means any executive department, or any independent agency or any Government corporation; and the term "employee" means any officer or employee of an agency.

Sec. 706. This Order shall be applicable to the United States Postal Service established by the Postal Reorganization Act of 1970 [Title 39, Postal Service].

Change of Name. Section 2-101 of Ex.Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055, substituted the words "Office of Personnel Management" for the words "Civil Service Commission" or "United States Civil Service Commission"; substituted the word "Office" for the word "Commission" wherever the word "Commission" is used as a reference to United States Civil Service Commission; and substituted the words "Director, Office of Personnel Management" for the words "Chairman, Civil Service Commission", "Chairman, United States Civil Service Commission", "Commissioners" or "Commissioner" wherever said word or words appeared in this Executive Order.

§ 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, or a part-time United States magistrate. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.

(b) For the purposes of sections 205 and 207 of this title, the term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

(Added Pub.L. 87-849, § 1(a), Oct. 23, 1962, 76 Stat. 1121, and amended Pub.L. 90-578, Title III, § 301(b), Oct. 17, 1968, 82 Stat. 1115.)

References in Text. Section 29(c) and (d) of the Act of August 10, 1956, referred to in subsec. (a), was repealed and the provisions thereof reenacted as sections 502, 2105(d) and 5534 of Title 5, U.S.C.A., Government Organization and Employees.

Prior Provisions. A prior section 202, Act June 25, 1948, c. 645, 62 Stat. 691, which prescribed penalties for any officer or other person who accepted or solicited anything of value to influence his decision, was eliminated in the general amendment of this chapter by Pub.L. 87-849, and is substantially covered by revised section 201.

§ 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for

any services rendered or to be rendered either by himself or another—

(1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect; or

(2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia,

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

(b) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Delegate, Commissioner, officer, or employee—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

(c) A special Government employee shall be subject to subsection (a) only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1121, and amended Pub.L. 91–405, Title II, § 204(d)(2), (3), Sept. 22, 1970, 84 Stat. 853.)

Prior Provisions. A prior section 203, Act June 25, 1948, c. 645, 62 Stat. 692, which related to the acceptance or demand by the district attorneys, or marshals or their assistants of any fees other than provided by law, was eliminated in the general amendment of this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 281 of this title prior to Pub.L. 87–849.

§ 204. Practice in United States Claims Court or the United States Court of Appeals for the Federal Circuit by Members of Congress

Whoever, being a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect, practices in the United States Claims Court or the United States Court of Appeals for the Federal Circuit, shall be fined not more than $10,000 or imprisoned for not more than two years, or both, and shall be incapable of holding any office of honor, trust, or profit under the United States.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1122, and amended Pub.L. 91–405, Title II, § 204(d)(2), Sept. 22, 1970, 84 Stat. 853; Pub.L. 97–164, Title I, § 147, Apr. 2, 1982, 96 Stat. 45.)

Prior Provisions. A prior section 204, Act June 25, 1948, c. 645, 62 Stat. 692, which related to an offer to influence a Member of Congress, was eliminated in the general amendment of this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

Provisions similar to this section were contained in former section 282 of this title prior to Pub.L. 87–849.

Private Sector Representatives on United States Delegations to International Telecommunications Meetings and Conferences. Pub.L. 97–241, Title I, § 120, Aug. 24, 1982, 96 Stat. 280, provided that:

"(a) Sections 203, 205, 207, and 208 of title 18, United States Code [sections 203, 205, 207, and 208 of this title], shall not apply to a private sector representative on the United States delegation to an international telecommunications meeting or conference who is specifically designated to speak on behalf of or otherwise represent the interests of the United States at such meeting or conference with respect to a particular matter, if the Secretary of State (or the Secretary's designee) certifies that no Government employee on the delegation is as well qualified to represent United States interests with respect to such matter and that such designation serves the national interest. All such representatives shall have on file with the Department of State the financial disclosure report required for special Government employees.

"(b) As used in this section, the term 'international telecommunications meeting or conference' means the conferences of the International Telecommunications Union, meetings of its International Consultative Committees for Radio and for Telephone and Telegraph, and such other international telecommunications meetings or conferences as the Secretary of State may designate."

§ 205. Activities of officers and employees in claims against and other matters affecting the Government

Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties—

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than sixty days during the immediately preceding period of three hundred and sixty-five consecutive days.

Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

Nothing herein or in section 203 prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except in those matters in which he has participated personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility, provided that the Government official responsible for appointment to his position approves.

Nothing herein or in section 203 prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States provided that the head of the department or agency concerned with the grant or contract shall certify in writing that the national interest so requires.

Such certification shall be published in the Federal Register.

Nothing herein prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1122.)

Prior Provisions. A prior section 205, Act June 25, 1948, c. 645, 62 Stat. 692, which related to the acceptance by a Member of Congress of anything of value to influence him, was eliminated in the general amendment of this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 283 of this title prior to Pub.L. 87–849.

§ 206. Exemption of retired officers of the uniformed services

Sections 203 and 205 of this title shall not apply to a retired officer of the uniformed services of the United States while not on active duty and not otherwise an officer or employee of the United States, or to any person specially excepted by Act of Congress.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1123.)

Prior Provisions. A prior section 206, Act June 25, 1948, c. 645, 62 Stat. 692, which related to an offer to a judge or judicial officer to influence him, was eliminated in the general amendment of this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

§ 207. Disqualification of former officers and employees; disqualification of partners of current officers and employees

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or

attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) as to (i), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; or

(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(d)(1) Subsection (c) of this section shall apply to a person employed—

(A) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) on active duty as a commissioned officer of a uniformed service assigned to pay grade of O–9 or above as described in section 201 of title 37, United States Code; or

(C) in a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay O–7 or O–8, as described in section 201 of title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make

appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past government service. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his responsibilities under this paragraph.

(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is—

(A) an elected official of a State or local government, or

(B) whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer or employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or

agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1123, and amended Pub.L. 95–521, Title V, § 501(a), Oct. 26, 1978, 92 Stat. 1864; Pub.L. 96–28, §§ 1, 2, June 22, 1978, 96 Stat. 76.)

References in Text. The Civil Service Reform Act of 1978, referred to in subsec. (d)(1)(C), is Pub.L. 95–454, Oct. 13, 1978, 92 Stat. 111.

Section 201 of title 37, United States Code, referred to in subsec. (d)(1)(C), is classified to section 201 of Title 37, U.S.C.A., Pay and Allowances of the Uniformed Services.

Section 1201(a) of the Higher Education Act of 1965, referred to in subsec. (d)(2)(B), is classified to section 1141(a) of Title 20, U.S.C.A., Education.

Section 501(c)(3) of the Internal Revenue Code of 1954, referred to in subsec. (d)(2)(B), is classified to section 501(c)(3) of Title 26, U.S.C.A., Internal Revenue Code.

"The effective date of this Act," referred to in subsec. (j), probably means the date of enactment of Pub.L. 95–521, Oct. 26, 1978.

Prior Provisions. A prior section 207, Act June 25, 1948, c. 645, 62 Stat. 692, which related to the acceptance of a bribe by a judge, was eliminated by the general amendment of this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 284 of this title prior to Pub.L. 87–849.

Applicability of 1978 Amendment. Section 502 of Pub.L. 95–521 provided that the amendments made to this section by section 501 shall not apply to those individuals who left Government service prior to the effective date of such amendments [July 1, 1979] or, in the case of individuals who occupied positions designated pursuant to section 207(d) of title 18, United States Code [subsec. (d) of this section], prior to the effective date of such designation; except that any such individual who returns to Government service on or after the effective date of such amendments or designation shall be thereafter covered by such amendments or designation.

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1124, and amended Pub.L. 95–188, Title II, § 205, Nov. 16, 1977, 91 Stat. 1388.)

Prior Provisions. A prior section 208, Act June 25, 1948, c. 645, 62 Stat. 693, which related to the acceptance of solicitation of a bribe by a judicial officer, was eliminated in the general amendment of this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

Provisions similar to those comprising this section were contained in section 434 of this title prior to Pub.L. 87–849.

§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United

States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of the Government Employees Training Act (Public Law 85–507, 72 Stat. 327; 5 U.S.C. 2301–2319, July 7, 1958).

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1954 and which is exempt from taxation under section 501(a) of such Code.

(Added Pub.L. 87–849, § 1(a), Oct. 23, 1962, 76 Stat. 1125, and amended Pub.L. 96–174, Dec. 29, 1979, 93 Stat. 1288; Pub.L. 97–171, § 1, Apr. 13, 1982, 96–67.)

References in Text. The Government Employees Training Act, referred to in subsec. (d), was repealed and the provisions thereof reenacted as section 4101 et seq. of Title 5, U.S.C.A., Government Organization and Employees.

Prior Provisions. A prior section 209, Act June 25, 1948, c. 645, 62 Stat. 693, which related to an offer of a bribe to a witness, was eliminated in the general amendment of this chapter by Pub.L. 87–849 and is substantially covered by section 201.

Provisions similar to those comprising this section were contained in section 1914 of this title prior to Pub.L. 87–849.

§ 210. Offer to procure appointive public office

Whoever pays or offers or promises any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, c. 645, 62 Stat. 694, § 210, formerly § 214, renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(b), 76 Stat. 1125.)

Historical and Revision Notes

Based on Title 18, U.S.C., 1940 ed., §§ 149 and 151 (Dec. 11, 1926, c. 3, §§ 1, 3, 44 Stat. 918).

Changes of style and substance were made in this section.

Term "or place" was inserted after words "appointive office" in order to give broader scope to the section and also to follow the phraseology used in similar provisions of section 202 of Title 18, U.S.C., 1940 ed., now section 216 [repealed] of this title. (See 46 Corpus Juris 924, where it is explained that the word "places" is used in a less technical sense than the word "offices".)

The punishment provision, added at the end of this section and section 215 [now section 211] of this title to secure uniformity of style throughout this chapter, was originally enacted as a separate section, incorporating the other two by reference. 80th Congress House Report No. 304.

Prior Provisions. A prior section 210, Act June 25, 1948, c. 645, 62 Stat. 693, which related to acceptance of a bribe by a witness, was eliminated in the general amendment of this chapter by Pub.L. 87–849, and is substantially covered in revised section 201.

§ 211. Acceptance or solicitation to obtain appointive public office

Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Whoever solicits or receives any thing of value in consideration of aiding a person to obtain employment under the United States either by referring his name to an executive department or agency of

the United States or by requiring the payment of a fee because such person has secured such employment shall be fined not more than $1,000, or imprisoned not more than one year, or both. This section shall not apply to such services rendered by an employment agency pursuant to the written request of an executive department or agency of the United States.

(June 25, 1948, c. 645, 62 Stat. 694, § 211, formerly § 215, amended Sept. 13, 1951, c. 380, 65 Stat. 320, and renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(b), 76 Stat. 1125.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 150 and 151 (Dec. 11, 1926, ch. 3, §§ 2, 3, 44 Stat. 918).

Same changes of style and substance were made in this section as in section 214 of this title.

Prior Provisions. A prior section 211, Act June 25, 1948, c. 645, 62 Stat. 693, which related to an offer of a gratuity to a revenue officer, was eliminated in the general amendment of this chapter by Pub.L. 87–849 and is substantially covered in revised section 201.

§ 212. Offer of loan or gratuity to bank examiner

Whoever, being an officer, director or employee of a bank which is a member of the Federal Reserve System or the deposits of which are insured by the Federal Deposit Insurance Corporation, or of any National Agricultural Credit Corporation, or of any land bank, Federal land bank association or other institution subject to examination by a farm credit examiner, or of any small business investment company, makes or grants any loan or gratuity, to any examiner or assistant examiner who examines or has authority to examine such bank, corporation, or institution, shall be fined not more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given.

The provisions of this section and section 218 of this title shall apply to all public examiners and assistant examiners who examine member banks of the Federal Reserve System or insured banks, or National Agricultural Credit Corporations, whether appointed by the Comptroller of the Currency, by the Board of Governors of the Federal Reserve System, by a Federal Reserve Agent, by a Federal Reserve bank or by the Federal Deposit Insurance Corporation, or appointed or elected under the laws of any state; but shall not apply to private examiners or assistant examiners employed only by a clearing-house association or by the directors of a bank.

(June 25, 1948, c. 645, 62 Stat. 694, § 212, formerly § 217, amended Aug. 21, 1958, Pub.L. 85–699, Title VII, § 701(a), 72 Stat. 698; Aug. 18, 1959, Pub.L. 86–168, Title I, § 104(h), 73 Stat. 387, and renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(d), 76 Stat. 1125.)

HISTORICAL AND REVISION NOTES

Based on sections 593 and 1245 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22, 38 Stat. 272; Sept. 26, 1918, ch. 177, § 5, 40 Stat. 970; Mar. 4, 1923, ch. 252, title II, § 209(e), 42 Stat. 1468; Feb. 25, 1927, ch. 191, § 15, 44 Stat. 1232; Aug. 23, 1935, ch. 614, § 326(a), 49 Stat. 715).

Section 593 of title 12, U.S.C., 1940 ed., Banks and Banking, was divided into three sections: this section and sections 218 and 655 of this title.

Words "shall be deemed guilty of a misdemeanor and" were omitted as unnecessary in view of definition of misdemeanor in section 1 of this title.

This section was expanded to include "National Agricultural Credit Corporations" by including this term in each paragraph, upon authority of section 1245 of title 12, U.S.C., 1940 ed., Banks and Banking.

No penalty was provided for offering a bribe to farm credit examiners. The words "or of any land bank, national farm loan association, or other institution subject to examination by a farm credit examiner," were added upon the authority of section 952 of said title 12.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes in phraseology were also made.

References in Text. Section 218 of this title, referred to in text, is a reference to section 218 prior to its redesignation as section 213 of this title.

Prior Provisions. A prior section 212, Act June 25, 1948, c. 645, 62 Stat. 693, which related to an offer or threat to a customs officer or employee, was eliminated in the general amendment to this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

§ 213. Acceptance of loan or gratuity by bank examiner

Whoever, being an examiner or assistant examiner of member banks of the Federal Reserve System or banks the deposits of which are insured by the Federal Deposit Insurance Corporation, or a farm credit examiner or examiner of National Agricultural Credit Corporations, or an examiner of small business investment companies, accepts a loan or gratuity from any bank, corporation, association or organization examined by him or from any person connected herewith, shall be fined not more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given, and shall be disqualified from holding office as such examiner.

(June 25, 1948, c. 645, 62 Stat. 695, § 213, formerly § 218, amended Aug. 21, 1958, Pub.L. 85–699, Title VII, § 701(b), 72 Stat. 698, and renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(d), 76 Stat. 1125.)

HISTORICAL AND REVISION NOTES

Based on sections 593, 952, 981, 1124, 1243, 1314 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22, 38 Stat. 272; July 17, 1916, ch. 245, §§ 28, 31, 39 Stat. 381, 382, and § 211(d) as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1460; Sept. 26, 1918, ch. 177, § 5, 40 Stat. 970; Mar. 4, 1923, ch. 252, title II, § 209(e), 216(d), 42 Stat. 1468, 1471; Feb. 25, 1927, ch. 191, § 15, 44 Stat. 1232; Ex. Ord. No. 6084, Mar. 27, 1933; June 16, 1933, ch. 98, § 80(a), 48 Stat. 273; Aug. 23, 1935, ch. 614, § 326(a), 49 Stat. 715; Aug. 19, 1937, ch. 704, § 20, 50 Stat. 710).

This section is derived primarily from second paragraph of section 593 of title 12, U.S.C., 1940 ed., Banks and Banking, and consolidates provisions from sections 952, 981, 1124, 1243, and 1314 of said title 12.

Words "shall be deemed guilty of a misdemeanor" were omitted in view of definition of misdemeanor in section 1 of this title.

The bribery provisions of such sections were alike and indeed were patterned after section 593 of said title 12, U.S.C., 1940 ed., Banks and Banking, incorporated in this section and section 217 of this title. Therefore, and in the light of sections 952 and 1243 of title 12, U.S.C., 1940 ed., Banks and Banking, this section was written as a consolidated section without change of substance or effect and with only such changes of phraseology as were necessary to effect the consolidation and secure uniformity of style.

Other provisions of said sections 593, 952, 981, 1124, 1243 and 1314 of title 12, U.S.C., 1940 ed., are incorporated in sections 217, 655, 1014, 1908, and 1909 of this title.

Prior Provisions. A prior section 213, Act June 25, 1948, c. 645, 62 Stat. 693, which related to the acceptance or demand of a bribe by a customs officer or employee, was eliminated in the general amendment to this chapter by Pub.L. 87–849 and is substantially covered by revised section 201.

§ 214. Offer for procurement of Federal Reserve bank loan and discount of commercial paper

Whoever stipulates for or gives or receives, or consents or agrees to give or receive, any fee, commission, bonus, or thing of value for procuring or endeavoring to procure from any Federal Reserve bank any advance, loan, or extension of credit or discount or purchase of any obligation or commitment with respect thereto, either directly from such Federal Reserve bank or indirectly through any financing institution, unless such fee, commission, bonus, or thing of value and all material facts with respect to the arrangement or understanding therefor shall be disclosed in writing in the application or request for such advance, loan, extension of credit, discount, purchase, or commitment, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(June 25, 1948, c. 645, 62 Stat. 695, § 214, formerly § 219, renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(d), 76 Stat. 1125.)

HISTORICAL AND REVISION NOTES

Based on section 599 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22(k), as added by act June 19, 1934, ch. 653, § 3, 48 Stat. 1108).

Final sentence of said section 599, imposing civil liability on violators, was omitted as unnecessary, being merely a declaration of that rule of common law which in the absence of statute fixes civil liability on the wrongdoer.

Minor changes were made in phraseology.

Prior Provisions. A prior section 214 of this title, was redesignated section 210.

§ 215. Receipt of commissions or gifts for procuring loans

(a) Whoever, being an officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, except as provided by law, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value, for himself or for any other person or entity, other than such financial institution, from any person or entity for or in connection with any transaction or business of such financial institution; or

(b) Whoever, except as provided by law, directly or indirectly, gives, offers, or promises anything of value to any officer, director, employee, agent, or attorney of any financial institution, bank holding company, or savings and loan holding company, or offers or promises any such officer, director, employee, agent, or attorney to give anything of value to any person or entity, other than such financial institution, for or in connection with any transaction or business of such financial institution, shall be fined not more than $5,000 or three times the value of anything offered, asked, given, received, or agreed to be given or received, whichever is greater, or imprisoned not more than five years, or both; but if the value of anything offered, asked, given, received, or agreed to be given or received does not exceed $100, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) As used in this section—

(1) "financial institution" means—

(A) any bank the deposits of which are insured by the Federal Deposit Insurance Corporation;

(B) any member, as defined in section 2 of the Federal Home Loan Bank Act, as amended, of the Federal Home Loan Bank System and any Federal Home Loan Bank;

(C) any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation;

(D) any credit union the accounts of which are insured by the Administrator of the National Credit Union Administration;

(E) any Federal land bank, Federal land bank association, Federal intermediate credit bank, production credit association, bank for cooperatives; and

(F) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); and

(2) "bank holding company" or "savings and loan holding company" means any person, corporation, partnership, business trust, association or similar organization which controls a financial institution in such a manner as to be a bank holding company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956 (12 U.S.C. 1841) or the Savings and Loan Holding Company Amendments of 1967 (12 U.S.C. 1730a).

(d) This section shall not apply to the payment by a financial institution of the usual salary or director's fee paid to an officer, director, employee, agent, or attorney thereof, or to a reasonable fee paid by such financial institution to such officer, director, employee, agent, or attorney for services rendered to such financial institution.

(June 25, 1948, c. 645, 62 Stat. 695, § 215, formerly § 220, amended Sept. 21, 1950, c. 967, § 4, 64 Stat. 894, and renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(d), 76 Stat. 1125, and amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 1107(a), 98 Stat. 2145.)

HISTORICAL AND REVISION NOTES

Based on sections 595, 1125, and 1315 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22, first sentence of second paragraph, 38 Stat. 272; July 17, 1916, ch. 245, § 211(e), as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1460; June 21, 1917, ch. 32, § 11, 40 Stat. 240; Sept. 26, 1918, ch. 177, § 5, part 22(c), 40 Stat. 970; Mar. 4, 1923, ch. 252, title II, § 216(e), 42 Stat. 1472).

The punishment provisions of the three sections were identical, and all other provisions thereof were similar, except that section 595 of title 12, U.S.C., 1940 ed., Banks and Banking, relating to officers, directors, employees, or attorneys of member banks of the Federal Reserve System, did not include the terms "agent" and "acceptance" and did not include the phrase "or extension or renewal of loan or substitution of security".

Words "shall be deemed guilty of a misdemeanor" were omitted because of definition of misdemeanor in section 1 of this title.

Words "and upon conviction" and "and shall upon conviction thereof" were omitted as surplusage because punishment cannot be imposed until after conviction.

Verbal changes were made for style purposes.

References in Text. Section 2 of the Federal Home Loan Bank Act, referred to in subsec. (c)(1)(B), is section 2 of Act July 22, 1932, ch. 522, 47 Stat. 725, which is classified to section 1422 of Title 12, Banks and Banking.

Prior Provisions. A prior section 215 of this title, was redesignated section 211.

[§ 216. Repealed. Pub.L. 98–473, Title II, § 1107(b), Oct. 12, 1984, 98 Stat. 2146]

Section, Act June 25, 1948, c. 645, § 216, formerly § 221, 62 Stat. 695, amended Aug. 21, 1958, Pub.L. 85–699, title VII, § 702(a)–(c), 72 Stat. 698; Aug. 18, 1959, Pub.L. 86–168, title I, § 104(h), 73 Stat. 387, and renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(d), 76 Stat. 1125, related to the receipt or charge of commissions or gifts for farm loan, land bank, or small business transactions.

A prior section 216, Act June 25, 1948, c. 645, 62 Stat. 694, which related to the procurement of a contract by an officer or Member of Congress, was repealed by section 1(c) of Pub.L. 87–849.

§ 217. Acceptance of consideration for adjustment of farm indebtedness

Whoever, being an officer or employee of, or person acting for the United States or any agency thereof, accepts any fee, commission, gift, or other consideration in connection with the compromise, adjustment, or cancellation of any farm indebtedness as provided by sections 1150, 1150a, and 1150b of Title 12, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, c. 645, 62 Stat. 696, § 217, formerly § 222, renumbered Oct. 23, 1962, Pub.L. 87–849, § 1(d), 76 Stat. 1125.)

HISTORICAL AND REVISION NOTES

Based on section 1150c(b) of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 20, 1944, ch. 623, § 4(b), 58 Stat. 837).

Words "upon conviction thereof" were omitted as surplusage, since punishment cannot be imposed until after conviction.

Other changes were made in phraseology without change of substance.

Prior Provisions. A prior section 217 of this title was redesignated section 212.

§ 218. Voiding transactions in violation of chapter; recovery by the United States

In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority, privilege, benefit, certificate, ruling, decision, opinion, or rate schedule awarded, granted, paid, furnished, or published, or the performance of any service or transfer or delivery of any thing to, by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, in rela-

tion to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended or the thing transferred or delivered on its behalf, or the reasonable value thereof.

(Added Pub.L. 87–849, § 1(e), Oct. 23, 1962, 76 Stat. 1125.)

Prior Provisions. A prior section 218 of this title was redesignated section 213.

Executive Order No. 12448

Nov. 4, 1983, 48 F.R. 51281

EXERCISE OF AUTHORITY

By the authority vested in me as President by the Constitution and statutes of the United States of America, including section 218 of title 18 of the United States Code [this section], and in order to provide federal agencies with the authority to promulgate regulations for voiding or rescinding contracts or other benefits obtained through bribery, graft or conflict of interest, it is hereby ordered as follows:

Section 1. The head of each Executive department, Military department and Executive agency is hereby delegated the authority vested in the President to declare void and rescind the transactions set forth in section 218 of title 18 of the United States Code [this section] in relation to which there has been a final conviction for any violation of chapter 11 of title 18 [section 201 et seq. of this title].

Sec. 2. The head of each Executive department and agency described in section 1 may exercise the authority hereby delegated by promulgating implementing regulations; provided that the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration jointly shall issue government-wide implementing regulations related to voiding or rescission of contracts.

Sec. 3. Implementing regulations adopted pursuant to this Order shall, at a minimum, provide the following procedural protections:

(a) Written notice of the proposed action shall be given in each case to the person or entity affected;

(b) The person or entity affected shall be afforded an opportunity to submit pertinent information on its behalf before a final decision is made;

(c) Upon the request of the person or entity affected, a hearing shall be held at which it shall have the opportunity to call witnesses on its behalf and confront any witness the agency may present; and

(d) The head of the agency or his designee shall issue a final written decision specifying the amount of restitution or any other remedy authorized by section 218 [this section], provided that such remedy shall take into consideration the fair value of any tangible benefits received and retained by the agency.

§ 219. Officers and employees acting as agents of foreign principals

Whoever, being a public official of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, is or acts as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938, as amended, shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Nothing in this section shall apply to the employment of any agent of a foreign principal as a special Government employee in any case in which the head of the employing agency certifies that such employment is required in the national interest. A copy of any certification under this paragraph shall be forwarded by the head of such agency to the Attorney General who shall cause the same to be filed with the registration statement and other documents filed by such agent, and made available for public inspection in accordance with section 6 of the Foreign Agents Registration Act of 1938, as amended.

For the purpose of this section "public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Governments thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

(Added Pub.L. 89–486, § 8(b), July 4, 1966, 80 Stat. 249, and amended Pub.L. 98–473, Title II, § 1116, Oct. 12, 1984, 98 Stat. 2149.)

References in Text. Section 6 of the Foreign Agents Registration Act of 1938, as amended, referred to in text, is classified to section 616 of Title 22, U.S.C.A., Foreign Relations and Intercourse.

Prior Provisions. Former section 219 of this title was redesignated section 214 by Pub.L. 87–849, § 1(d), Oct. 23, 1962, 76 Stat. 1125.

[§§ 220 to 222. Redesignated]

Sections were redesignated as sections 215 to 217 by Pub.L. 87–849.

[§ 223. Repealed. Pub.L. 87–849, § 1(c), Oct. 23, 1962, 76 Stat. 1125]

§ 224. Bribery in sporting contests

(a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(b) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, territory, Commonwealth, or possession of the United States, and no law of any State, territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

(c) As used in this section—

(1) The term "scheme in commerce" means any scheme effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication;

(2) The term "sporting contest" means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term "person" means any individual and any partnership, corporation, association, or other entity.

(Added Pub.L. 88–316, § 1(a), June 6, 1964, 78 Stat. 203.)

CHAPTER 12—CIVIL DISORDERS

Sec.
231. Civil disorders.
232. Definitions.
233. Preemption.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 231. Civil disorders

(a)(1) Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function; or

(2) Whoever transports or manufactures for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that the same will be used unlawfully in furtherance of a civil disorder; or

(3) Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) Nothing contained in this section shall make unlawful any act of any law enforcement officer which is performed in the lawful performance of his official duties.

(Added Pub.L. 90–284, Title X, § 1002(a), Apr. 11, 1968, 82 Stat. 90.)

§ 232. Definitions

For purposes of this chapter:

(1) The term "civil disorder" means any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.

(2) The term "commerce" means commerce (A) between any State or the District of Columbia and any place outside thereof; (B) between points within any State or the District of Columbia, but through any place outside thereof; or (C) wholly within the District of Columbia.

(3) The term "federally protected function" means any function, operation, or action carried out, under the laws of the United States, by any department, agency, or instrumentality of the United States or by an officer or employee thereof; and such term shall specifically include, but not be limited to, the collection and distribution of the United States mails.

(4) The term "firearm" means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of any such weapon.

(5) The term "explosive or incendiary device" means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable

liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

(6) The term "fireman" means any member of a fire department (including a volunteer fire department) of any State, any political subdivision of a State, or the District of Columbia.

(7) The term "law enforcement officer" means any officer or employee of the United States, any State, any political subdivision of a State, or the District of Columbia, while engaged in the enforcement or prosecution of any of the criminal laws of the United States, a State, any political subdivision of a State, or the District of Columbia; and such term shall specifically include, but shall not be limited to, members of the National Guard, as defined in section 101(9) of title 10, United States Code, members of the organized militia of any State, or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, not included within the definition of National Guard as defined by such section 101(9), and members of the Armed Forces of the United States, while engaged in suppressing acts of violence or restoring law and order during a civil disorder.

(Added Pub.L. 90–284, Title X, § 1002(a), Apr. 11, 1968, 82 Stat. 91.)

§ 233. Preemption

Nothing contained in this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which any provisions of the chapter operate to the exclusion of State or local laws on the same subject matter, nor shall any provision of this chapter be construed to invalidate any provision of State law unless such provision is inconsistent with any of the purposes of this chapter or any provision thereof.

(Added Pub.L. 90–284, Title X, § 1002(a), Apr. 11, 1968, 82 Stat. 91.)

CHAPTER 13—CIVIL RIGHTS

Sec.
241. Conspiracy against rights of citizens
242. Deprivation of rights under color of law.
243. Exclusion of jurors on account of race or color.
244. Discrimination against person wearing uniform of armed forces.
245. Federally protected activities.
246. Deprivation of relief benefits.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 241. Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

(As amended Apr. 11, 1968, Pub.L. 90–284, Title I, § 103(a), 82 Stat. 75.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 51 (Mar. 4, 1909, ch. 321, § 19, 35 Stat. 1092).

Clause making conspirator ineligible to hold office was omitted as incongruous because it attaches ineligibility to hold office to a person who may be a private citizen and who was convicted of conspiracy to violate a specific statute. There seems to be no reason for imposing such a penalty in the case of one individual crime, in view of the fact that other crimes do not carry such a severe consequence. The experience of the Department of Justice is that this unusual penalty has been an obstacle to successful prosecutions for violations of the act.

Mandatory punishment provision was rephrased in the alternative.

Minor changes in phraseology were made.

§ 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

(As amended Apr. 11, 1968, Pub.L. 90–284, Title I, § 103(b), 82 Stat. 75.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 52 (Mar. 4, 1909, ch. 321, § 20, 35 Stat. 1092).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

A minor change was made in phraseology.

§ 243. Exclusion of jurors on account of race or color

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

Historical and Revision Notes

Based on section 44 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Mar. 1, 1875, ch. 114, § 4, 18 Stat. 336).

Words "be deemed guilty of a misdemeanor, and" were deleted as unnecessary in view of definition of misdemeanor in section 1 of this title.

Words "on conviction thereof" were omitted as unnecessary, since punishment follows only after conviction.

Minimum punishment provisions were omitted. (See revisor's note under section 203 of this title.)

Minor changes in phraseology were made.

§ 244. Discrimination against person wearing uniform of armed forces

Whoever, being a proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, or Possession of the United States, causes any person wearing the uniform of any of the armed forces of the United States to be discriminated against because of that uniform, shall be fined not more than $500.

(As amended May 24, 1949, c. 139, § 5, 63 Stat. 90.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., § 523 (Mar. 1, 1911, ch. 187, 36 Stat. 963; Aug. 24, 1912, ch. 387, § 1, 37 Stat. 512; Jan. 28, 1915, ch. 20, § 1, 38 Stat. 800).

Words "guilty of a misdemeanor", following "shall be", were omitted as unnecessary in view of definition of "misdemeanor" in section 1 of this title. (See reviser's note under section 212 of this title.)

Changes were made in phraseology.

1949 Act

This section [section 5] substitutes, in section 244 of title 18, U.S.C., "any of the armed forces of the United States" for the enumeration of specific branches and thereby includes the Air Force, formerly part of the Army. This clarification is necessary because of the establishment of the Air Force as a separate branch of the Armed Forces by the act of July 26, 1947.

§ 245. Federally protected activities

(a)(1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer" means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

(Added Pub.L. 90–284, Title I, § 101(a), Apr. 11, 1968, 82 Stat. 73.)

Fair Housing. Section 101(b) of Pub.L. 90–284 provided that: "Nothing contained in this section shall apply to or affect activities under title VIII of this Act [sections

3601–3619 of Title 42, U.S.C.A., The Public Health and Welfare]."

Riots or Civil Disturbances, Suppression and Restoration of Law and Order. Section 101(c) of Pub.L. 90–284 provided that: "The provisions of this section shall not apply to acts or omissions on the part of law enforcement officers, members of the National Guard, as defined in section 101(9) of title 10, United States Code, members of the organized militia of any State or the District of Columbia, not covered by such section 101(9), or members of the Armed Forces of the United States, who are engaged in suppressing a riot or civil disturbance or restoring law and order during a riot or civil disturbance."

§ 246. Deprivation of relief benefits

Whoever directly or indirectly deprives, attempts to deprive, or threatens to deprive any person of any employment, position, work, compensation, or other benefit provided for or made possible in whole or in part by any Act of Congress appropriating funds for work relief or relief purposes, on account of political affiliation, race, color, sex, religion, or national origin, shall be fined not more than $10,000, or imprisoned not more than one year, or both.

(Added Pub.L. 94–453, § 4(a), Oct. 2, 1976, 90 Stat. 1517.)

CHAPTER 15—CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT

Sec.

281. Compensation to Members of Congress, officers, and others in matters affecting the Government.[1]
282. Practice in Court of Claims by Members of Congress.[1]
283. Officers or employees interested in claims against the Government.[1]
284. Disqualification of former officers and employees in matters connected with former duties.[1]
285. Taking or using papers relating to claims.
286. Conspiracy to defraud the Government with respect to claims.
287. False, fictitious or fraudulent claims.
288. False claims for postal losses.
289. False claims for pensions.
290. Discharge papers withheld by claim agent.
291. Purchase of claims for fees by court officials.
292. Solicitation of employment and receipt of unapproved fees concerning Federal employees' compensation.

1 Sections repealed without amending chapter analysis to reflect such repeal.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

[§§ 281 to 284. Repealed. Pub.L. 87–849, § 2, Oct. 23, 1962, 76 Stat. 1126]

Exemptions. Section 2 of Pub.L. 87–849 provided in part that:

"All exemptions from the provisions of sections 281, 282, 283, 284, 434, or 1914 of title 18 of the United States Code heretofore created or authorized by statute which are in force on the effective date of this Act [Pub.L. 87–849] shall, on and after that date, be deemed to be exemptions from sections 203, 204, 205, 207, 208, or 209, respectively, of title 18 of the United States Code except to the extent that they affect officers or employees of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, as to whom they are no longer applicable."

Exception of Retired Officers of the Armed Forces. The repeal of sections 281 and 283 by Pub.L. 87–849 was a limited repeal only, in that, under section 2 of Pub.L. 87–849, such sections would continue to apply to retired officers of the Armed Forces of the United States. For purposes of such limited applicability, sections 281 and 283 are set out as follows:

"§ 281. Compensation to Members of Congress, officers, and others in matters affecting the Government

"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

"Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department in whose service he holds a retired status.

"This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by Act of Congress.

"§ 283. Officers or employees interested in claims against the Government

"Whoever, being an officer or employee of the United States or any department or agency thereof, or of the Senate or House of Representatives, acts as an agent or attorney for prosecuting any claim against the United States, or aids or assists in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, shall be fined not

more than $10,000 or imprisoned not more than one year, or both.

"Retired officers of the armed forces of the United States, while not on active duty, shall not by reason of their status as such be subject to the provisions of this section. Nothing herein shall be construed to allow any such retired officer within two years next after his retirement to act as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States involving the department in whose service he holds a retired status, or to allow any such retired officer to act as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States involving any subject matter with which he was directly connected while he was in an active-duty status.

"This section shall not apply to any person because of his membership in the National Guard of the District of Columbia nor to any person specially excepted by enactment of Congress."

§ 285. Taking or using papers relating to claims

Whoever, without authority, takes and carries away from the place where it was filed, deposited, or kept by authority of the United States, any certificate, affidavit, deposition, statement of facts, power of attorney, receipt, voucher, assignment, or other document, record, file, or paper prepared, fitted, or intended to be used or presented to procure the payment of money from or by the United States or any officer, employee, or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States, whether the same has or has not already been so used or presented, and whether such claim, account, or demand, or any part thereof has or has not already been allowed or paid; or

Whoever presents, uses, or attempts to use any such document, record, file, or paper so taken and carried away, to procure the payment of any money from or by the United States, or any officer, employee, or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 92 (Mar. 4, 1909, ch. 321, § 40, 35 Stat. 1096).

Word "employee" was inserted after "officer" in two places to clarify scope of section.

The words "five years" were substituted for "ten years" in the punishment provision to conform to like provisions in similar offenses. (See section 1001 of this title.)

Changes were made in phraseology.

§ 286. Conspiracy to defraud the Government with respect to claims

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 83 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

To clarify meaning of "department" the word "agency" was inserted after it. (See definitions of "department" and "agency" in section 6 of this title.)

Words "or any corporation in which the United States of America is a stockholder" were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

Minor changes in phraseology were made.

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 80 (Mar. 4, 1909 ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Section 80 of title 18, U.S.C., 1940 ed., was divided into two parts. That portion making it a crime to present false claims was retained as this section. The part relating to false statements is now section 1001 of this title.

To clarify meaning of "department" words "agency" and "or agency" were inserted after it. (See definitions of "department" and "agency" in section 6 of this title.)

Words "or any corporation in which the United States of America is a stockholder" which appeared in two places were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

The words "five years" were substituted for "ten years" to harmonize the punishment provisions of comparable sections involving offenses of the gravity of felonies, but not of such heinous character as to warrant a 10-year punishment. (See sections 914, 1001, 1002, 1005, 1006 of this title.)

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

§ 288. False claims for postal losses

Whoever makes, alleges, or presents any claim or application for indemnity for the loss of any registered or insured letter, parcel, package, or other article or matter, or the contents thereof, knowing such claim or application to be false, fictitious, or fraudulent; or

Whoever for the purpose of obtaining or aiding to obtain the payment or approval of any such claim or application, makes or uses any false statement, certificate, affidavit, or deposition; or

Whoever knowingly and willfully misrepresents, or misstates, or, for the purpose aforesaid, knowingly and willfully conceals any material fact or circumstance in respect of any such claim or application for indemnity—

Shall be fined not more than $500 or imprisoned not more than one year, or both.

Where the amount of such claim or application for indemnity is less than $100 only a fine shall be imposed.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 354 (Mar. 4, 1909, ch. 321, § 224, 35 Stat. 1133; Aug. 5, 1939, ch. 429, 53 Stat. 1203).

Reference to persons causing, assisting, aiding, or abetting, was omitted as such persons are made principals by section 2 of this title.

Changes in phraseology were made.

§ 289. False claims for pensions

Whoever knowingly and willfully makes, or presents any false, fictitious or fraudulent affidavit, declaration, certificate, voucher, endorsement, or paper or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Administrator of Veterans' Affairs, or knowingly or willfully makes or presents any paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged by the pensioner; or

Whoever knowingly and falsely certifies that the declarant, affiant, or witness named in such declaration, affidavit, voucher, endorsement, or other paper or writing personally appeared before him and was sworn thereto, or acknowledged the execution thereof—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on section 81 of title 18, section 126 of title 38, Pensions, Bonuses, and Veterans' Relief, and section 787 of title 43, Public Lands, all of U.S.C., 1940 ed. (R.S. § 4746; July 7, 1898, ch. 578, 30 Stat. 718; Aug. 17, 1912, ch. 301, § 1, 37 Stat. 312; July 3, 1930, ch. 863, § 2, 46 Stat. 1016).

Reference to persons aiding or assisting or causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "or bounty land", before "prosecution of any claim for pension", were omitted as obsolete. (See reviser's note under section 290 of this title.)

Upon authority of 1930 enactment words "Administrator of Veterans' Affairs" were substituted for "Commissioner of Pensions or of the Secretary of the Interior", which appeared in 1898 enactment.

The fine was changed from "$500" for [sic] "$10,000" to conform with punishment provision of section 287 of this title.

Minor changes in phraseology were also made.

§ 290. Discharge papers withheld by claim agent

Whoever, being a claim agent, attorney, or other person engaged in the collection of claims for pay, pension, or other allowances for any soldier, sailor, or marine, or for any commissioned officer of the military or naval forces, or for any person who may have been a soldier, sailor, marine, or officer of the regular or volunteer forces of the United States, or for his dependents or beneficiaries, retains, without the consent of the owner or owners thereof, or refuses to deliver or account for the same upon demand duly made by the owner or owners thereof, or by their agent or attorney, the discharge papers of any such soldier, sailor, or marine, or commissioned officer, which may have been placed in his hands for the purpose of collecting said claims, shall be fined not more than $500 or imprisoned not more than six months, or both; and shall be debarred from prosecuting any such claim in any department or agency of the United States.

Historical and Revision Notes

Based on section 100 of title 31, Money and Finance, section 130 of title 38, Pensions, Bonuses, and Veterans' Relief, and section 841 of title 43, Public Lands, all U.S.C., 1940 ed. (May 21, 1872, ch. 178, 17 Stat. 137).

Words "deemed guilty of a misdemeanor" were deleted as unnecessary. (See definition of "misdemeanor" in section 1 of this title.)

Words "and shall upon conviction, be" were omitted as surplusage since punishment can follow only after conviction.

To clarify meaning of "executive department" word "executive" before "department" was deleted and words "or agency" were inserted after it. (See definitions of "department" and "agency" in section 6 of this title.)

Words "bounty", before "pension", and "or land warrant", before "of any such soldier", were deleted as obsolete. According to regulations, Circular 1151, Janu-

ary 8, 1929, issued by the Secretary of the Interior and the General Land Office (see 43 CFR 131.1–131.2) "warrants for bounty lands were and are issued by the Commissioner of Pensions (Administrator of Veterans' Affairs) for services in wars or battles prior to March 3, 1855 only." Further, it is stated that "Warrants can not now be 'located' upon the public lands. The locating privilege was denied except in the state of Missouri after the passage of the act of March 2, 1889 (25 Stat. 854; 43 U.S.C. § 700), and there are no lands known to the General Land Office to be subject to warrant location in Missouri."

Words "and honorably discharged" were omitted as unnecessary and words "or for his dependents or beneficiaries" were inserted after "United States" so as to embrace an important class of persons who employ attorneys or agents in the collection of claims permitted by statute.

Minor changes of phraseology were also made.

§ 291. Purchase of claims for fees by court officials

Whoever, being a judge, clerk, or deputy clerk of any court of the United States or a Territory or Possession thereof, or a United States district attorney, assistant attorney, marshal, deputy marshal, commissioner, or other person holding any office or employment, or position of trust or profit under the United States, directly or indirectly purchases at less than the full face value thereof, any claim against the United States for the fee, mileage, or expenses of any witness, juror, deputy marshal, or any other officer of such court, shall be fined not more than $1,000.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 193 (Mar. 4, 1909, ch. 321, § 104, 35 Stat. 1107).

Word "Possession" was inserted to clarify scope of section.

Minor changes were made in phraseology.

Change of Name. United States commissioners, referred to in text, were replaced by United States magistrates pursuant to Pub.L. 90–578, Oct. 17, 1968, 82 Stat. 1118. See section 631 et seq. of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

§ 292. Solicitation of employment and receipt of unapproved fees concerning Federal employees' compensation

Whoever solicits employment for himself or another in respect to a case, claim, or award for compensation under, or to be brought under, subchapter I of chapter 81 of title 5; or

Whoever receives a fee, other consideration, or gratuity on account of legal or other services furnished in respect to a case, claim, or award for compensation under subchapter I of chapter 81 of title 5, unless the fee, consideration, or gratuity is approved by the Secretary of Labor—

Shall, for each offense, be fined not more than $1,000 or imprisoned not more than one year, or both.

(Added Pub.L. 89–554, § 3(b), Sept. 6, 1966, 80 Stat. 608.)

Historical and Revision Notes

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 773(b) (last sentence).	Oct. 14, 1949, ch. 691, § 208 "Sec. 23(b) (last sentence)", 63 Stat. 865.

The words "under subchapter I of chapter 81 of title 5" are substituted for "under this Act" (Federal Employees' Compensation Act) to reflect the codification of the Act in title 5, United States Code.

The words "is approved by the Secretary of Labor" are substituted for "is so approved". The words "Secretary of Labor" are substituted for "Administrator" (Federal Security Administrator) on authority of 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 64 Stat. 1271.

The words "shall be guilty of a misdemeanor" are omitted as unnecessary in view of the definitive section 1 of this title. (See reviser's note under 18 U.S.C. 212, 1964 ed.)

The words "and upon conviction thereof" are omitted as unnecessary because punishment can be imposed only after conviction.

The words "or both" are substituted for "or by both such fine and imprisonment".

Minor changes in phraseology are made to conform to the style of title 18.

CHAPTER 17—COINS AND CURRENCY

Sec.

331. Mutilation, diminution, and falsification of coins.
332. Debasement of coins; alteration of official scales, or embezzlement of metals.
333. Mutilation of national bank obligations.
334. Issuance of Federal Reserve or national bank notes.
335. Circulation of obligations of expired corporations.
336. Issuance of circulating obligations of less than $1.
337. Coins as security for loans.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 331. Mutilation, diminution, and falsification of coins

Whoever fraudulently alters, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens any of the coins coined at the mints of the United States, or any foreign coins which are by law made

current or are in actual use or circulation as money within the United States; or

Whoever fraudulently possesses, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States, any such coin, knowing the same to be altered, defaced, mutilated, impaired, diminished, falsified, scaled, or lightened—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(As amended July 16, 1951, c. 226, § 1, 65 Stat. 121.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 279 (Mar. 4, 1909, ch. 321, § 165, 35 Stat. 1119).

Mandatory punishment provision was rephrased in the alternative.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes were also made in phraseology.

§ 332. Debasement of coins; alteration of official scales, or embezzlement of metals

If any of the gold or silver coins struck or coined at any of the mints of the United States shall be debased, or made worse as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than the same ought to be, pursuant to law, or if any of the scales or weights used at any of the mints or assay offices of the United States shall be defaced, altered, increased, or diminished through the fault or connivance of any officer or person employed at the said mints or assay offices, with a fraudulent intent; or if any such officer or person shall embezzle any of the metals at any time committed to his charge for the purpose of being coined, or any of the coins struck or coined at the said mints, or any medals, coins, or other moneys of said mints or assay offices at any time committed to his charge, or of which he may have assumed the charge, every such officer or person who commits any of the said offenses shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 280 (Mar. 4, 1909, ch. 321, § 166, 35 Stat. 1120).

Mandatory punishment provision was rephrased in the alternative.

§ 333. Mutilation of national bank obligations

Whoever mutilates, cuts, defaces, disfigures, or perforates, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt issued by any national banking association, or Federal Reserve bank, or the Federal Reserve System, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued, shall be fined not more than $100 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 291 (Mar. 4, 1909, ch. 321, § 176, 35 Stat. 1122).

Words "or Federal Reserve bank, or the Federal Reserve System" were inserted because the paper of such banks has almost supplanted national bank currency.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

§ 334. Issuance of Federal Reserve or national bank notes

Whoever, being a Federal Reserve Agent, or an agent or employee of such Federal Reserve Agent, or of the Board of Governors of the Federal Reserve System, issues or puts in circulation any Federal Reserve notes, without complying with or in violation of the provisions of law regulating the issuance and circulation of such Federal Reserve notes; or

Whoever, being an officer acting under the provisions of chapter 2 of Title 12, countersigns or delivers to any national banking association, or to any other company or person, any circulating notes contemplated by that chapter except in strict accordance with its provisions—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on sections 581 and 592 of title 12, U.S.C., 1940 ed., Banks and Banking (R.S. §§ 5187, 5209; Sept. 26, 1918, ch. 177, § 7, 40 Stat. 972; Aug. 23, 1935, ch. 614, § 316, 49 Stat. 712).

This section consolidates section 581 and part of section 592 of title 12, U.S.C., 1940 ed., Banks and Banking.

The punishment provision was drawn from said section 592 as being the latest expression of congressional intent, in preference to the provision of said section 581 which authorized a fine "not more than double the amount so countersigned and delivered and imprisonment not more than 15 years".

The words "shall be guilty of a misdemeanor" were omitted as unnecessary in view of definition of misdemeanor in section 1 of this title.

Likewise the words "upon conviction in any district court of the United States" were omitted as unnecessary since punishment can follow only after conviction.

(See reviser's note under section 656 of this title for statement of reasons for dividing said section 592 into

three revised sections, with consequent changes in phraseology, style, and arrangement.)

§ 335. Circulation of obligations of expired corporations

Whoever, being a director, officer, or agent of a corporation created by Act of Congress, the charter of which has expired, or trustee thereof, or an agent of such trustee, or a person having in his possession or under his control the property of such corporation for the purpose of paying or redeeming its notes and obligations, knowingly issues, reissues, or utters as money, or in any other way knowingly puts in circulation any bill, note, check, draft, or other security purporting to have been made by any such corporation, or by any officer thereof, or purporting to have been made under authority derived therefrom, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 289 (Mar. 4, 1909, ch. 321, § 174, 35 Stat. 1122).

The reference to persons aiding was omitted as unnecessary, since such persons are made principals by section 2 of this title.

The last sentence excepting bona fide holders in due course was omitted as surplusage.

Other changes in phraseology also were made.

§ 336. Issuance of circulating obligations of less than $1

Whoever makes, issues, circulates, or pays out any note, check, memorandum, token, or other obligation for a less sum than $1, intended to circulate as money or to be received or used in lieu of lawful money of the United States, shall be fined not more than $500 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 293 (Mar. 4, 1909, ch. 321, § 178, 35 Stat. 1122).

Numerous suggestions, of which that of Mr. E. M. Million, of Arlington, Va., is typical, recommended that this section be omitted as obsolete or revised to except commercial obligations. However, since the decisions make it plain that only obligations intended to circulate as money are within the provisions of this section and that commercial checks of less than $1 are not affected, there seems no reason so to rewrite the section. (See *U.S. v. Monongahela Bridge Co.*, Fed. Cas. No. 15,796; *Stettinius* v. *U.S.*, Fed. Cas. No. 13,387.)

Minor changes were made in phraseology.

§ 337. Coins as security for loans

Whoever lends or borrows money or credit upon the security of such coins of the United States as the Secretary of the Treasury may from time to time designate by proclamation published in the Federal Register, during any period designated in such a proclamation, shall be fined not more than $10,000 or imprisoned not more than one year, or both.

(Added Pub.L. 89–81, Title II, § 212(a), July 23, 1965, 79 Stat. 257.)

CHAPTER 18—CONGRESSIONAL ASSASSINATION, KIDNAPING, AND ASSAULT

Sec.

351. Congressional, Cabinet, and Supreme Court assassination, kidnaping, and assault; penalties.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 351. Congressional, Cabinet, and Supreme Court assassination, kidnaping, and assault; penalties

(a) Whoever kills any individual who is a Member of Congress or a Member-of-Congress-elect, a member of the executive branch of the Government who is the head, or a person nominated to be head during the pendency of such nomination, of a department listed in section 101 of title 5 or the second ranking official in such department, the Director (or a person nominated to be Director during the pendency of such nomination) or Deputy Director of Central Intelligence, or a Justice of the United States, as defined in section 451 of title 28, or a person nominated to be a Justice of the United States, during the pendency of such nomination, shall be punished as provided by sections 1111 and 1112 of this title.

(b) Whoever kidnaps any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.

(d) If two or more persons conspire to kill or kidnap any individual designated in subsection (a) of this section and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

(e) Whoever assaults any person designated in subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than $10,000, or imprisoned for not more than ten years, or both.

(f) If Federal investigative or prosecutive jurisdiction is asserted for a violation of this section, such assertion shall suspend the exercise of jurisdiction by a State or local authority, under any applicable State or local law, until Federal action is terminated.

(g) Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

(h) In a prosecution for an offense under this section the Government need not prove that the defendant knew that the victim of the offense was an official protected by this section.

(i) There is extraterritorial jurisdiction over the conduct prohibited by this section.

(Added Pub.L. 91–644, Title IV, § 15, Jan. 2, 1971, 84 Stat. 1891, and amended Pub.L. 97–285, §§ 1, 2(a), Oct. 16, 1982, 96 Stat. 1219.)

CHAPTER 19—CONSPIRACY

Sec.

371. Conspiracy to commit offense or to defraud United States.
372. Conspiracy to impede or injure officer.
373. Solicitation to commit a crime of violence.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 88, 294 (Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096; Mar. 4, 1909, ch. 321, § 178a, as added Sept. 27, 1944, ch. 425, 58 Stat. 752).

This section consolidates said sections 88 and 294 of title 18, U.S.C., 1940 ed.

To reflect the construction placed upon said section 88 by the courts the words "or any agency thereof" were inserted. (See *Haas* v. *Henkel*, 1909, 30 S.Ct. 249, 216 U.S. 462, 54 L.Ed. 569, 17 Ann.Cas. 1112, where court said: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government." Also, see *United States v. Walter*, 1923, 44 S.Ct. 10, 263 U.S. 15, 68 L.Ed. 137, and definitions of department and agency in section 6 of this title.)

The punishment provision is completely rewritten to increase the penalty from 2 years to 5 years except where the object of the conspiracy is a misdemeanor. If the object is a misdemeanor, the maximum imprisonment for a conspiracy to commit that offense, under the revised section, cannot exceed 1 year.

The injustice of permitting a felony punishment on conviction for conspiracy to commit a misdemeanor is described by the late Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York, in an address delivered March 14, 1944, before the section on Federal Practice of the New York Bar Association, reported in 3 Federal Rules Decisions, pages 380–392.

Hon. John Paul, United States district judge for the western district of Virginia, in a letter addressed to Congressman Eugene J. Keogh dated January 27, 1944, stresses the inadequacy of the 2-year sentence prescribed by existing law in cases where the object of the conspiracy is the commission of a very serious offense.

The punishment provision of said section 294 of title 18 was considered for inclusion in this revised section. It provided the same penalties for conspiracy to violate the provisions of certain counterfeiting laws, as are applicable in the case of conviction for the specific violations. Such a punishment would seem as desirable for all conspiracies as for such offenses as counterfeiting and transporting stolen property in interstate commerce.

A multiplicity of unnecessary enactments inevitably leads to confusion and disregard of law. (See reviser's note under section 493 of this title.)

Since consolidation was highly desirable and because of the strong objections of prosecutors to the general application of the punishment provision of said section 294, the revised section represents the best compromise that could be devised between sharply conflicting views.

A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense. Special conspiracy provisions were retained in sections 241, 286, 372, 757, 794, 956, 1201, 2271, 2384 and 2388 of this title. Special conspiracy provisions were added to sections 2153 and 2154 of this title.

§ 372. Conspiracy to impede or injure officer

If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 54 (Mar. 4, 1909, ch. 321, § 21, 35 Stat. 1092).

Scope of section was enlarged to cover all possessions of the United States. When the section was first enacted in 1861 there were no possessions, and hence the use of the words "State of Territory" was sufficient to describe the area then subject to the jurisdiction of the United States. The word "District" was inserted by the codifiers of the 1909 Criminal Code.

§ 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

(Added Pub.L. 98–473, Title II, § 1003(a), Oct. 12, 1984, 98 Stat. 2138.)

CHAPTER 21—CONTEMPTS

Sec.
401. Power of court.
402. Contempts constituting crimes.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

HISTORICAL AND REVISION NOTES

Based on section 385 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Mar. 3, 1911, ch. 231, § 268, 36 Stat. 1163).

Said section 385 conferred two powers. The first part authorizing courts of the United States to impose and administer oaths will remain in title 28, U.S.C., 1940 ed., Judicial Code and Judiciary. The second part relating to contempt of court constitutes this section.

Changes in phraseology and arrangement were made.

§ 402. Contempts constituting crimes

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided

in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

(As amended May 24, 1949, c. 139, § 8(c), 63 Stat. 90.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 386, 387, 389, and 390a of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Oct. 15, 1914, ch. 323, §§ 1, 21, 22, 24, 38 Stat. 730, 738, 739).

Section 21 of the Clayton Act, section 386 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, is here consolidated with parts of sections 1, 22, and 24 of the same act. Section 1 of said act, section 390a of title 28 U.S.C., 1940 ed., Judicial Code and Judiciary, defined person or persons. Section 22 of said act, section 387 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, regulated the procedure and provided for the punishment of contempts. Section 24 of said act, section 389 of title 28, U.S.C, 1940 ed., Judicial Code and Judiciary, limited the application of these sections to certain kinds of contempt.

In transferring these sections to this title and in consolidating them numerous changes of phraseology were necessary which do not, however, change their meaning or substance. Words "corporation or association" were inserted after "any person" in substitution for the definition provisions of section 390a of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, which read as follows: "The word 'person' or 'persons' wherever used in sections 381–383, 386–390a of this title, sections 12, 13, 14–19, 20, 21, 22–27 and 44 of title 15, and section 412 of title 18 shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

The words "any person, corporation, or association," unqualified except by the context of the section mean all that the more lengthy definition included. Only those persons, corporations, and associations who were parties to the order or had actual notice of it may be punished for contempt. (See *McCauly v. First Trust & Savings Bank*, C.C.A.Ill.1921, 276 F.117. See, also *National Labor Relations Board v. Blackstone Mfg. Co.*, C.C.A.1941, 123 F.2d 633.) The fact that the contemnor was incorporated or organized under a foreign law or under the laws of a particular State or Territory would hardly be relevant to the issue of criminal contempt.

As noted above these sections were part of the Clayton Act, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." Whatever doubt might have existed as to whether the contempt provisions were variously limited to antitrust cases seems to be dispelled by the case of *Sandefur v. Canoe Creek Coal Co.* (C.C.A. Ky.1923, 293 F. 379, certified question answered 45 S.Ct. 18, 266 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451), where the court says: "The act, considered as a whole, covers several more or less distinct subjects. * * * The first eight sections pertain directly to the subject of trust and monopolies; section 9 concerns interstate commerce; section 10, combinations among common carriers; section 11, proceedings to enforce certain provisions of the act; sections 12–16, antitrust procedure and remedies; sections 17–19, regulations of injunction and restraining orders in all cases; section 20 limits the power of an equity court to issue any injunction in a certain class of cases, viz., between employer and the employee; and sections 21–24 pertain to procedure in any district court, punishing contemptuous disregard of any order of such court, providing the act constituting contempt is also a criminal offense. Observing this relation of the various parts of the act to each other, we think 'within the purview of this act' must refer to that portion of the act which most broadly covers the subject-matter to which section 22 is devoted, and this portion is section 21, which reaches all cases where the act of contempt is also a criminal offense. We know of nothing in the legislative history of the act, or within the common knowledge as to the then existing situation, which justifies us in thinking that 'within the purview of this act,' in section 22, meant to limit its effect to the employer-employee provisions of section 20, or even to the antitrust scope of some of the earlier sections." (See also *Michaelson v. United States*, 1924, 45 S.Ct. 18, 166 U.S. 42, 69 L.Ed. 162, 35 A.L.R. 451, and H.Rept. No. 613, 62d Cong., 2d sess., to accompany H.R. 15657.)

1949 ACT

This amendment [see section 8] corrects the catchline of section 402 of title 18, U.S.C., to better represent the section content.

CHAPTER 23—CONTRACTS

Sec.

431. Contracts by Member of Congress.
432. Officer or employee contracting with Member of Congress.
433. Exemptions with respect to certain contracts.
434. Interested persons acting as Government agents.[1]
435. Contracts in excess of specific appropriation.
436. Convict labor contracts.
437. Indian contracts for goods and supplies.[2]

Sec.
438. Indian contracts for services generally.
439. Indian enrollment contracts.
440. Mail contracts.
441. Postal supply contracts.
442. Printing contracts.
443. War contracts.

[1] Section repealed without amending analysis to reflect such repeal.

[2] Catchline amended without corresponding amendment of item 437.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 431. Contracts by Member of Congress

Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertakes, executes, holds, or enjoys, in whole or in part, any contract or agreement, made or entered into in behalf of the United States or any agency thereof, by any officer or person authorized to make contracts on its behalf, shall be fined not more than $3,000.

All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced by the United States or any agency thereof, in consideration of any such contract or agreement, it shall forthwith be repaid; and in case of failure or refusal to repay the same when demanded by the proper officer of the department or agency under whose authority such contract or agreement shall have been made or entered into, suit shall at once be brought against the person so failing or refusing and his sureties for the recovery of the money so advanced.

(As amended Oct. 31, 1951, c. 655, § 19, 65 Stat. 717.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 204 (Mar. 4, 1909, ch. 321, § 114, 35 Stat. 1109).

Word "agency" was inserted in three places to eliminate any ambiguity as to scope of section. (See definition of department or agency under section 6 of this title.)

Minor changes were made in phraseology.

§ 432. Officer or employee contracting with Member of Congress

Whoever, being an officer or employee of the United States, on behalf of the United States or any agency thereof, directly or indirectly makes or enters into any contract, bargain, or agreement, with any Member of or Delegate to Congress, or any Resident Commissioner, either before or after he has qualified, shall be fined not more than $3,000.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 205 (Mar. 4, 1909, ch. 321, § 115, 35 Stat. 1109).

Words "agency" and "employee" were inserted to eliminate any ambiguity as to scope of section. (See definition of agency under section 6 of this title.)

Changes were made in phraseology.

§ 433. Exemptions with respect to certain contracts

Sections 431 and 432 of this title shall not extend to any contract or agreement made or entered into, or accepted by any incorporated company for the general benefit of such corporation; nor to the purchase or sale of bills of exchange or other property where the same are ready for delivery and payment therefor is made at the time of making or entering into the contract or agreement. Nor shall the provisions of such sections apply to advances, loans, discounts, purchase or repurchase agreements, extensions, or renewals thereof, or acceptances, releases or substitutions of security therefor or other contracts or agreements made or entered into under the Reconstruction Finance Corporation Act, the Agricultural Adjustment Act, the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Farm Credit Act of 1933, or the Home Owners Loan Act of 1933, the Farmers' Home Administration Act of 1946, the Bankhead-Jones Farm Tenant Act, or to crop insurance agreements or contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers.

Any exemption permitted by this section shall be made a matter of public record.

(As amended Oct. 4, 1961, Pub.L. 87–353, § 3(*o*), 75 Stat. 774.)

Historical and Revision Notes

Based on section 1514(f) of title 7, U.S.C., 1940 ed., Agriculture; sections 264w, 598, 1138d(e), 1441(e), 1467(d) of title 12, U.S.C., 1940 ed., Banks and Banking; section 616(e) of title 15, U.S.C., 1940 ed., Commerce and Trade; title 18, U.S.C., 1940 ed., § 206 (Mar. 4, 1909, ch. 321, § 116, 35 Stat. 1109; Dec. 23, 1913, ch. 6, § 22(j), as added June 19, 1934, ch. 653, § 3, 48 Stat. 1107; Jan. 22, 1932, ch. 8, § 16(e), 47 Stat. 12; July 22, 1932, ch. 522, § 21, 47 Stat. 738; June 13, 1933, ch. 64, § 8, 48 Stat. 135; June 16, 1933, ch. 98, § 64, 48 Stat. 268, 269; Jan. 25, 1934, ch. 5, 48 Stat. 337; Jan. 31, 1934, ch. 7, § 13, 48 Stat. 347; June 27, 1934, ch. 847, title V, § 510, 58 Stat. 1264; May 28, 1935, ch. 150, §§ 20, 21, 49 Stat. 298; Aug. 23, 1935, ch. 614, § 101, 49 Stat. 703; Aug. 26, 1937, ch. 821, 50 Stat. 838; Feb. 16, 1938, ch. 30, title V, § 514, 52 Stat. 77).

These sections were consolidated with such changes of phraseology as were necessary to effect consolidation.

Said section 206 of title 18, U.S.C., 1940 ed., was the principal source of this section but the enumeration of the kinds of commitments exempted was drawn from the various sections of said title 12 set forth above. The reference to crop insurance agreements is drawn from section 1514(f) of Title 7, Agriculture.

The applicability provisions of the sections here consolidated were unclear and of doubtful value. As revised the section preserves everything of value without change of substance.

References to the Bankhead-Jones Farm Tenant Act and the Farmers' Home Administrative Act of 1946 were included in this revised section notwithstanding the omission (and consequent repeal) of former subsection (d) of section 52 of the said Bankhead-Jones Act (1937) (Title 7, U.S.C., 1940 ed., § 1026) in the amendment of said section 52 of such Act by section 3 of the said Farmers' Home Administration Act of 1946 (August 14, 1946, ch. 964, 60 Stat. 1062). The essential nature of the transactions under the several acts would render inconsistent any attempt to include some and exclude others.

References in Text. The Reconstruction Finance Corporation Act, referred to in text, was repealed.

The Agricultural Adjustment Act, referred to in text, is classified generally to section 601 et seq. of Title 7, U.S.C.A., Agriculture.

The Federal Farm Loan Act, referred to in text, was repealed. See now the Farm Credit Act of 1971.

The Emergency Farm Mortgage Act of 1933, referred to in text, was substantially repealed.

The Farm Credit Act of 1933, referred to in text, was repealed. See now the Farm Credit Act of 1971.

The Home Owners Loan Act of 1933, referred to in text, is classified generally to section 1461 et seq. of Title 12, U.S.C.A., Banks and Banking.

The Farmers' Home Administration Act of 1946, referred to in text, was substantially repealed.

The Bankhead-Jones Farm Tenant Act, referred to in text, is classified generally to section 1000 et seq. of Title 7, U.S.C.A., Agriculture.

[§ 434. Repealed. Pub.L. 87-849, § 2, Oct. 23, 1962, 76 Stat. 1126]

Exemptions. Section 2 of Pub.L. 87-849 provided that all exemptions from the provisions of this section heretofore created or authorized by statute which are in force on the effective date of the repeal of this section deemed to be exemptions from section 208 of this title except to the extent that they affect officers or employees of the executive branch of the United States government, of any independent agency of the United States, or of the District of Columbia, as to whom they are no longer applicable.

§ 435. Contracts in excess of specific appropriation

Whoever, being an officer or employee of the United States, knowingly contracts for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 184 (Mar. 4, 1909, ch. 321, § 98, 35 Stat. 1106).

Words "or employee" were inserted to remove any ambiguity as to scope of section.

The offense described in this section involves no moral turpitude, and therefore the punishment provisions were reduced from $2,000 to $1,000 and from 2 years to 1 year, so that the stigma of a felony would not attach to an offender. (See classification of felony and misdemeanor in section 1 of this title and note thereunder.)

Mandatory punishment provisions were rephrased in the alternative.

Changes were also made in phraseology.

§ 436. Convict labor contracts

Whoever, being an officer, employee, or agent of the United States or any department or agency thereof, contracts with any person or corporation, or permits any warden, agent, or official of any penal or correctional institution, to hire out the labor of any prisoners confined for violation of any laws of the United States, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 708, 709 (Feb. 23, 1887, ch. 213, §§ 1, 2, 24 Stat. 411).

This section consolidates sections 708 and 709 of title 18, U.S.C., 1940 ed., as the offense and penalty provisions, respectively.

Words "department or agency thereof" were inserted to clarify scope of section. See definition of department and agency in section 6 of this title.

To retain uniformity words "shall be deemed guilty of a misdemeanor, and," were omitted. The reference to misdemeanor is now covered by the definition in section 1 of this title.

Words "on conviction thereof" were omitted as unnecessary since punishment can follow only upon conviction.

The minimum punishment provisions "less than one year nor" and "less than $500 nor" were deleted to conform to the policy followed by codifiers of 1909 Criminal Code. (See reviser's note under section 203 of this title.)

Changes were also made in phraseology.

§ 437. Federal employees contracting or trading with Indians

(a) Except as provided in subsection (b), whoever, being an officer, employee, or agent of the Bureau of Indian Affairs or the Indian Health Service has (other than as a lawful representative of the United States) any interest, in such officer, employee, or agent's name, or in the name of

another person where such officer, employee, or agent benefits or appears to benefit from such interest—

(1) in any contract made or under negotiation with any Indian, for the purchase or transportation or delivery of goods or supplies for any Indian, or

(2) in any purchase or sale of any service or real or personal property (or any interest therein) from or to any Indian, or

colludes with any person attempting to obtain any such contract, purchase, or sale, shall be fined not more than $5,000 or imprisoned not more than six months or both, and shall be removed from office, notwithstanding any other provision of law concerning termination from Federal employment.

(b)(1) Notwithstanding the provisions of subsection (a) and in accordance with paragraph (2) of this subsection, the President or his designee may prescribe rules and regulations under which any officer, employee, or agent of the Bureau of Indian Affairs or of the Indian Health Service may purchase from or sell to any Indian any service or any real or personal property or any interest therein.

(2) No rule or regulation prescribed pursuant to paragraph (1) of this subsection shall permit any officer, employee, or agent referred to in that paragraph—

(A) to make any purchase from or sale to an Indian of any real or personal property (or any interest therein) for the purpose of commercially selling, reselling, trading, or bartering such property; or

(B) to have any interest in any purchase or sale involving property or funds which are either held in trust by the United States for Indians or which are purchased, sold, utilized, or received in connection with a contract or grant to an Indian from the Bureau of Indian Affairs or the Indian Health Service, if such officer, employee, or agent is employed in the office or installation of such Bureau or Service which recommends, approves, executes, or administers such transaction, grant, or contract on behalf of the United States: *Provided,* That such officer, employee, or agent may have such an interest if such purchase or sale is approved by the Secretary of the Interior in the case of a Bureau of Indian Affairs officer, employee, or agent, or by the Secretary of Health, Education, and Welfare in the case of an Indian Health Service officer, employee, or agent, or a designee of such Secretary who is not employed at such office or installation: *Provided further,* That (1) any such designee may not be a relative by blood or marriage of the officer, employee, or agent engaging in such purchase or sale; (2) with respect to purchases or sales by any officer, employee, or agent employed at the reservation, agency, or service unit level, such designee must be employed at not less than one grade level higher than such officer, employee, or agent at the Washington, District of Columbia, central office or at an area office installation other than that with authority over such reservation, agency, or service unit; (3) with respect to purchases or sales by any officer, employee, or agent employed at the area office level, such designee must be employed at not less than one grade level higher than such officer, employee, or agent at the Washington, District of Columbia, central office; and (4) the Secretary must approve purchases or sales by any officer, employee, or agent employed at the Washington, District of Columbia, central office; or

(C) to acquire any interest in property held in trust, or subject to restriction against alienation imposed, by the United States unless the conveyance or granting of such interest in such property is otherwise authorized by law.

(c) Except as provided in subsection (b)(2), nothing contained in this section shall be construed as preventing any officer, employee, or agent of the Bureau of Indian Affairs or the Indian Health Service who is an Indian, of whatever degree of Indian blood, from obtaining or receiving any benefit or benefits made available to Indians generally or to any member of his or her particular tribe, under any Act of Congress, nor to prevent any such officer, employee, or agent who is an Indian from being a member of or receiving benefits by reason of his or her membership in any Indian tribe, corporation, or cooperative association organized by Indians, when authorized under such rules and regulations as the Secretary of the Interior or the Secretary of Health, Education, and Welfare, or their designee shall prescribe.

(d) For purposes of this section, the term "Indian" means any member of an Indian tribe recognized as eligible for the services provided by the Bureau of Indian Affairs who is residing on a Federal Indian Reservation, on land held in trust by the United States for Indians, or on land subject to a restriction against alienation imposed by the United States. The term shall also include any such tribe and any Indian owned or controlled organization located on such a reservation or land.

(e) For purposes of this section, the term "Bureau of Indian Affairs" means the Bureau of Indian Affairs and the Office of the Assistant Secre-

tary for Indian Affairs, both in the Department of the Interior.

(As amended June 17, 1980, Pub.L. 96–277, § 1, 94 Stat. 544.)

HISTORICAL AND REVISION NOTES

Based on section 37 of title 25, U.S.C., 1940 ed., Indians (June 22, 1874, ch. 389, § 10, 18 Stat. 177).

To clarify scope of section words "department or agency" were substituted for "of the departments". (See definitions of department and agency in section 6 of this title.)

Word "officer" was inserted to remove all ambiguity as to scope of section.

Words "The violation of any of the provisions of this section shall be a misdemeanor, and" were omitted as unnecessary in view of definition of misdemeanor in section 1 of this title.

The minimum fine clause "less than $500 nor" was omitted to conform to policy followed by codifiers of 1909 Criminal Code.

Changes in phraseology were also made.

Change of Name. The Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services and the Secretary, or any other official, of Health, Education, and Welfare was redesignated the Secretary or official, as appropriate, of Health and Human Services by Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, with any reference to the Department, Secretary or other official of Health, Education, and Welfare deemed to refer to the Department, Secretary or other official of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary or Department of Education pursuant to section 301 of Pub.L. 96–88. See sections 3441 and 3508 of Title 20, U.S.C.A., Education.

Validity of Transactions Prior to Effective Date of Pub.L. 96–277. Section 3 of Pub.L. 96–277 provided that: "The Secretary of the Interior may review any transaction, other than one involving the sale of property held in trust or subject to a restriction against alienation imposed by the United States, occurring prior to the effective date of this Act [effective sixty days after June 17, 1980] and, if the Secretary finds that such transaction would have been valid had the provisions of this Act [Pub.L. 96–277] been in effect at the time of such transaction, the Secretary may declare such transaction to be valid, subject to all valid transactions subsequent to such time. The Secretary may issue or execute such documents as may be necessary or desirable to evidence the validity of such a transaction. A declaration of validity of a transaction pursuant to this section shall be conclusive evidence of such validity notwithstanding the provisions of section 437 of title 18, United States Code [former provisions of this section]; section 2078 of the Revised Statutes [former section 68 of this title]; section 14 of the Act of June 30, 1834 (4 Stat. 738) [predecessor provisions of former section 68 of this title]; and section 10 of the Act of June 22, 1874 (18 Stat. 177) [former section 87 of this title], which may have been in effect at the time of such transaction."

EXECUTIVE ORDER NO. 12328

Oct. 8, 1981, 46 F.R. 50357

DELEGATION OF FUNCTIONS

By the authority vested in me as President of the United States of America by Section 437(b) of Title 18 of the United States Code (94 Stat. 544; Public Law 96–277) [Subsec. (b) of this section], and Section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], it is hereby ordered as follows:

Section 1. The functions vested in the President by Section 437(b) of Title 18 of the United States Code (94 Stat. 544; Public Law 96–277) [subsec. (b) of this section] to prescribe rules and regulations under which any officer, employee, or agent of the Bureau of Indian Affairs may purchase from or sell to any Indian any service or any real or personal property or any interest therein, are delegated to the Secretary of the Interior.

Sec. 2. The functions vested in the President by Section 437(b) of Title 18 of the United States Code (94 Stat. 544; Public Law 96–277) [subsec. (b) of this section] to prescribe rules and regulations under which any officer, employee, or agent of the Indian Health Service may purchase from or sell to any Indian any service or any real or personal property or any interest therein, are delegated to the Secretary of Health and Human Services.

Sec. 3. Until rules and regulations are issued pursuant to Sections 1 and 2 of this Order, those rules and regulations previously applicable to Federal employees contracting or trading with Indians are hereby adopted as the rules and regulations of the President pursuant to, and to the extent not inconsistent with, Section 437(b) of Title 18 of the United States Code [subsec. (b) of this section] (25 CFR 251.5 and 252.31).

RONALD REAGAN

§ 438. Indian contracts for services generally

Whoever receives money contrary to sections 81 and 82 of Title 25, shall be fined not more than $1,000 or imprisoned not more than six months, or both; and also forfeit the money so received.

HISTORICAL AND REVISION NOTES

Based on section 83 of title 25, U.S.C., 1940 ed., Indians (R.S. § 2105).

The reference to persons aiding and abetting was omitted as unnecessary. Such persons are made principals by section 2 of this title.

Punishment by imprisonment "for not less than six months" and fine of "not less than $1,000," was susceptible of no other meaning than that minimum punishment was mandatory. This has been rephrased to provide a flexible punishment within the former mandatory limits.

Words "Indian agents" were omitted as such agents have not existed since 1908. (See 25 U.S.C., §§ 32, 64, and notes thereunder.)

Sentence providing "And it shall be the duty of all district attorneys to prosecute such cases when applied to do so, and their failure and refusal shall be ground for

their removal from office." was omitted because any misfeasance of office on the part of a United States district attorney is ground for his removal.

Provision of disqualification of office for violators of this section was omitted as incongruous with the small penalty and fine provisions.

Minor changes were made in phraseology.

§ 439. Indian enrollment contracts

Unless the United States consents, all contracts made with any person or persons, applicants for enrollment as citizens in the Five Civilized Tribes for compensation for services in relation thereto, shall be void, and—

Whoever collects or receives any moneys from any such applicants for citizenship, shall be fined not more than $500 or imprisoned not more than six months, or both.

Historical and Revision Notes

Based on section 86 (part) of title 25, U.S.C., 1940 ed., Indians (Aug. 1, 1914, ch. 222, § 17, 38 Stat. 601).

Only that part of said section 86 which requires the consent of the United States to enrollment contracts was incorporated in this section.

Minor changes were made in phraseology.

§ 440. Mail contracts

Whoever, being a person employed in the Postal Service, becomes interested in any contract for carrying the mail, or acts as agent, with or without compensation, for any contractor or person offering to become a contractor in any business before the Postal Service, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(3), 84 Stat. 777.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 356 (Mar. 4, 1909, ch. 321, § 226, 35 Stat. 1134).

Provision for dismissal from office was omitted since this might be handled better administratively.

Changes were made in phraseology.

§ 441. Postal supply contracts

No contract for furnishing supplies to the Postal Service shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for furnishing such supplies, or to fix a price or prices therefor, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract, or to bid at a specified price or prices thereon.

Whoever violates this section shall be fined not more than $5,000 or imprisoned not more than one year, or both; and if the offender is a contractor for furnishing such supplies his contract may be annulled.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(4), 84 Stat. 777.)

Historical and Revision Notes

Based on section 808 of title 39, U.S.C., 1940 ed., The Postal Service (Aug. 24, 1912, ch. 389, § 2, 37 Stat. 553).

Minimum punishment provisions "less than $100 nor" and "less than three months nor" were omitted to conform to policy followed by codifiers of 1909 Criminal Code.

Changes in phraseology were also made.

§ 442. Printing contracts

Neither the Public Printer, superintendent of printing, superintendent of binding, nor any of their assistants shall, during their continuance in office, have any interest, direct or indirect, in the publication of any newspaper or periodical, or in any printing, binding, engraving, or lithographing of any kind, or in any contract for furnishing paper or other material connected with the public printing, binding, lithographing, or engraving.

Whoever violates this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on section 53 of title 44, U.S.C., 1940 ed., Public Printing and Documents (Jan. 12, 1895, ch. 23, § 34, 28 Stat. 605).

Words "on conviction before any court of competent jurisdiction" were omitted as unnecessary, since punishment cannot be imposed until there has been a conviction before a competent tribunal.

Words "in the penitentiary" were omitted as surplusage as section 4082 of this title commits all prisoners to the custody of the Attorney General. (See reviser's note under section 1 of this title.)

The minimum punishment provision "for a term of not less than one nor" was omitted in keeping with policy of codifiers of 1909 Criminal Code.

Mandatory punishment provision was rephrased in the alternative.

The offense described in this section involves no moral turpitude, and therefore the punishment provisions were reduced from 5 years to 1 year, so that the stigma of a felony would not attach to an offender. The fine was increased from $500 to $1,000 as more proportionate to the 1-year term of imprisonment. (See classification of felony and misdemeanor in section 1 of this title and note thereunder.)

§ 443. War contracts

Whoever willfully secretes, mutilates, obliterates, or destroys—

(a) any records of a war contractor relating to the negotiation, award, performance, payment, interim financing, cancellation or other termination, or settlement of a war contract of $25,000 or more; or

(b) any records of a war contractor or purchaser relating to any disposition of termination inventory in which the consideration received by any war contractor or any government agency is $5,000 or more,

before the lapse of (1) five years after such disposition of termination inventory by such war contractor or government agency, or (2) five years after the final settlement of such war contract, or (3) five years after 12 o'clock noon of December 31, 1946, whichever applicable period is longer, shall, if a corporation, be fined not more than $50,000, and, if a natural person, be fined not more than $10,000 or imprisoned not more than five years, or both.

The Administrator of General Services, by regulation, may authorize the destruction of such records upon such terms and conditions as he deems appropriate, including the requirement for the making and retaining of photographs or microphotographs, which shall have the same force and effect as the originals thereof.

The definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section.
(As amended Oct. 31, 1951, c. 655, § 20(a), 65 Stat. 717.)

HISTORICAL AND REVISION NOTES

Based on section 119, first and second paragraphs, of title 41 U.S.C., 1940 ed., Public Contracts (July 1, 1944, ch. 358, § 19(a), 58 Stat. 667).

Section was rewritten with changes of phraseology to conform to the style adopted in the revision.

The definition of "records" was omitted as surplusage in order to avoid any inference that "records" as used in other sections was intended to have a different or more limited connotation than the broad and commonly understood meaning popularly assigned to the term.

The last paragraph was added to obviate any possibility of doubt as to meaning of terms defined in section 103 of Title 41, Public Contracts.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

CHAPTER 25—COUNTERFEITING AND FORGERY

Sec.

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511. Altering or removing motor vehicle identification numbers.
512. Forfeiture of certain motor vehicles and motor vehicle parts.

1 Section catchline amended without amending analysis.

2 So in original. Section catchline reads "Customs matters".

3 So in original. Does not conform to section designation as 511.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 471. Obligations or securities of United States

Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 262 (Mar. 4, 1909, ch. 321, § 148, 35 Stat. 1115).

Mandatory punishment provision was rephrased in the alternative.

Changes in phraseology were made.

§ 472. Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 265 (Mar. 4, 1909, ch. 321, § 151, 35 Stat. 1116).

Mandatory punishment provision was rephrased in the alternative.

Changes in phraseology were made.

§ 473. Dealing in counterfeit obligations or securities

Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 268 (Mar. 4, 1909, ch. 321, § 154, 35 Stat. 1117).

Reference to circulating notes of banking associations was omitted as covered by definition of obligation or other security in section 8 of this title.

Changes in phraseology were made.

§ 474. Plates or stones for counterfeiting obligations or securities

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 264 (Mar. 4, 1909, ch. 321, § 150, 35 Stat. 1116).

References to persons causing, procuring, assisting or aiding were omitted as unnecessary as such persons are made principals by section 2 of this title.

Changes in phraseology were made.

§ 475. Imitating obligations or securities; advertisements

Whoever designs, engraves, prints, makes, or executes, or utters, issues, distributes, circulates, or uses any business or professional card, notice, placard, circular, handbill, or advertisement in the likeness or similitude of any obligation or security of the United States issued under or authorized by any Act of Congress or writes, prints, or otherwise impresses upon or attaches to any such instrument, obligation, or security, or any coin of the United States, any business or professional card, notice, or advertisement, or any notice or advertisement whatever, shall be fined not more than $500.

(As amended July 16, 1951, c. 226, § 2, 65 Stat. 122.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 292 (Mar. 4, 1909, ch. 321, § 177, 35 Stat. 1122).

Enumeration of obligations of the United States was omitted in view of definition in section 8 of this title.

Changes in phraseology were also made.

§ 476. Taking impressions of tools used for obligations or securities

Whoever, without authority from the United States, takes, procures, or makes an impression, stamp, or imprint of, from or by the use of any tool, implement, instrument, or thing used or fitted or intended to be used in printing, stamping, or impressing, or in making other tools, implements, instruments, or things to be used or fitted or intended to be used in printing, stamping, or impressing any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 266 (Mar. 4, 1909, ch. 321, § 152, 35 Stat. 1117).

Enumeration of substances on which impressions could be made and enumeration of various kinds of tools to be used were omitted as unnecessary.

Reference to circulating note or evidence of debt was omitted in view of definition of obligations and securities in section 8 of this title.

Changes in phraseology were also made.

§ 477. Possessing or selling impressions of tools used for obligations or securities

Whoever, with intent to defraud, possesses, keeps, safeguards, or controls, without authority from the United States, any imprint, stamp, or impression, taken or made upon any substance or material whatsoever, of any tool, implement, instrument or thing, used, fitted or intended to be used, for any of the purposes mentioned in section 476 of this title; or

Whoever, with intent to defraud, sells, gives, or delivers any such imprint, stamp, or impression to any other person—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 267 (Mar. 4, 1909, ch. 321, § 153, 35 Stat. 1117).

Changes in phraseology were made.

§ 478. Foreign obligations or securities

Whoever, within the United States, with intent to defraud, falsely makes, alters, forges, or counterfeits any bond, certificate, obligation, or other security of any foreign government, purporting to be or in imitation of any such security issued under the authority of such foreign government, or any treasury note, bill, or promise to pay, lawfully issued by such foreign government and intended to circulate as money, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 270 (Mar. 4, 1909, ch. 321, § 156, 35 Stat. 1117).

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

Changes were also made in phraseology.

§ 479. Uttering counterfeit foreign obligations or securities

Whoever, within the United States, knowingly and with intent to defraud, utters, passes, or puts off, in payment or negotiation, any false, forged, or counterfeited bond, certificate, obligation, security, treasury note, bill, or promise to pay, mentioned in section 478 of this title, whether or not the same was made, altered, forged, or counterfeited within the United States, shall be fined not more than

$3,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 271 (Mar. 4, 1909, ch. 321, § 157, 35 Stat. 1118).

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

§ 480. Possessing counterfeit foreign obligations or securities

Whoever, within the United States, knowingly and with intent to defraud, possesses or delivers any false, forged, or counterfeit bond, certificate, obligation, security, treasury note, bill, promise to pay, bank note, or bill issued by a bank or corporation of any foreign country, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 274 (Mar. 4, 1909, ch. 321, § 160, 35 Stat. 1118).

Mandatory punishment provision was rephrased in the alternative.

Changes were also made in phraseology.

§ 481. Plates or stones for counterfeiting foreign obligations or securities

Whoever, within the United States except by lawful authority, controls, holds, or possesses any plate, stone, or other thing, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation, or uses such plate, stone, or other thing, or knowingly permits or suffers the same to be used in counterfeiting such foreign obligations, or any part thereof; or

Whoever, except by lawful authority, makes or engraves any plate, stone, or other thing in the likeness or similitude of any plate, stone, or other thing designated for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation; or

Whoever, except by lawful authority, prints, photographs, or makes, executes, or sells any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; or

Whoever brings into the United States any counterfeit plate, stone, or other thing, engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 275 (Mar. 4, 1909, ch. 321, § 161, 35 Stat. 1118).

References to persons causing, procuring, assisting or aiding were omitted as unnecessary as such persons are made principals by section 2 of this title.

Changes in phraseology were made.

§ 482. Foreign bank notes

Whoever, within the United States, with intent to defraud, falsely makes, alters, forges, or counterfeits any bank note or bill issued by a bank or corporation of any foreign country, and intended by the law or usage of such foreign country to circulate as money, such bank or corporation being authorized by the laws of such country, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 272 (Mar. 4, 1909, ch. 321, § 158, 35 Stat. 1118).

Reference to persons causing, procuring, aiding and assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

§ 483. Uttering counterfeit foreign bank notes

Whoever, within the United States, utters, passes, puts off, or tenders in payment, with intent to defraud, any such false, forged, altered, or counterfeited bank note or bill, mentioned in section 482 of this title, knowing the same to be so false, forged, altered, and counterfeited, whether or not the same was made, forged, altered, or counterfeited within the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 273 (Mar. 4, 1909, ch. 321, § 159, 35 Stat. 1118).

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

§ 484. Connecting parts of different notes

Whoever so places or connects together different parts of two or more notes, bills, or other genuine instruments issued under the authority of the United States, or by any foreign government, or corporation, as to produce one instrument, with intent to

defraud, shall be guilty of forgery in the same manner as if the parts so put together were falsely made or forged, and shall be fined not more than $1,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 276 (Mar. 4, 1909, ch. 321, § 162, 35 Stat. 1119).

Minor changes in phraseology were made.

§ 485. Coins or bars

Whoever falsely makes, forges, or counterfeits any coin or bar in resemblance or similitude of any coin of a denomination higher than 5 cents or any gold or silver bar coined or stamped at any mint or assay office of the United States, or in resemblance or similitude of any foreign gold or silver coin current in the United States or in actual use and circulation as money within the United States; or

Whoever passes, utters, publishes, sells, possesses, or brings into the United States any false, forged, or counterfeit coin or bar, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any person, or attempts the commission of any offense described in this paragraph—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

(As amended July 23, 1965, Pub.L. 89–81, Title II, § 211(a), 79 Stat. 257.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 277 (Mar. 4, 1909, ch. 321, § 163, 35 Stat. 1119).

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

The provision for imprisonment for 10 years was changed to 15 years to conform to sections 471 and 472 of this title.

Changes were made in phraseology.

§ 486. Uttering coins of gold, silver or other metal

Whoever, except as authorized by law, makes or utters or passes, or attempts to utter or pass, any coins of gold or silver or other metal, or alloys of metals, intended for use as current money, whether in the resemblance of coins of the United States or of foreign countries, or of original design, shall be fined not more than $3,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 281 (Mar. 4, 1909, ch. 321, § 167, 35 Stat. 1120).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes were made in phraseology.

§ 487. Making or possessing counterfeit dies for coins

Whoever, without lawful authority, makes any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substance, in likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining or making of any of the genuine gold, silver, nickel, bronze, copper, or other coins coined at the mints of the United States; or

Whoever, without lawful authority, possesses any such die, hub, or mold, or any part thereof, or permits the same to be used for or in aid of the counterfeiting of any such coins of the United States—

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 283 (Mar. 4, 1909, ch. 321, § 169, 35 Stat. 1120).

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

The provision for imprisonment for 10 years was changed to 15 years to conform to section 471 of this title.

Changes in phraseology were made.

§ 488. Making or possessing counterfeit dies for foreign coins

Whoever, within the United States, without lawful authority, makes any die, hub, or mold, or any part thereof, either of steel or of plaster, or of any other substance, in the likeness or similitude, as to the design or the inscription thereon, of any die, hub, or mold designated for the coining of the genuine coin of any foreign government; or

Whoever, without lawful authority, possesses any such die, hub, or mold, or any part thereof, or conceals, or knowingly suffers the same to be used for the counterfeiting of any foreign coin—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 284 (Mar. 4, 1909, ch. 321, § 170, 35 Stat. 1120).

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Provision for $2,000 fine was increased to $5,000 to conform with section 481 of this title.

Changes in phraseology were made.

§ 489. Making or possessing likeness of coins

Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money, either under the authority of the United States or under the authority of any foreign government shall be fined not more than $100.

(As amended July 16, 1951, c. 226, § 3, 65 Stat. 122.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 285 (Mar. 4, 1909, ch. 321, § 171, 35 Stat. 1121; Feb. 15, 1912, ch. 38, 37 Stat. 64).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes were made in phraseology.

§ 490. Minor coins

Whoever falsely makes, forges, or counterfeits any coin in the resemblance or similitude of any of the one-cent and 5-cent coins minted at the mints of the United States; or

Whoever passes, utters, publishes, or sells, or brings into the United States, or possesses any such false, forged, or counterfeited coin, with intent to defraud any person, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

(As amended Feb. 14, 1984, Pub.L. 98–216, § 3(b)(1), 98 Stat. 6.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 285 (Mar. 4, 1909, ch. 321, § 171, 35 Stat. 1121; Feb. 15, 1912, ch. 38, 37 Stat. 64).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes were made in phraseology.

Effective Date of 1984 Amendment. Section 4(c) of Pub.L. 98–216, Feb. 14, 1984, 98 Stat. 7, provided that the amendment by section 3(b)(1) of Pub.L. 98–216 is effective as of Sept. 13, 1982.

§ 491. Tokens or paper used as money

(a) Whoever, being 18 years of age or over, not lawfully authorized, makes, issues, or passes any coin, card, token, or device in metal, or its compounds, intended to be used as money, or whoever, being 18 years of age or over, with intent to defraud, makes, utters, inserts, or uses any card, token, slug, disk, device, paper, or other thing similar in size and shape to any of the lawful coins or other currency of the United States or any coin or other currency not legal tender in the United States, to procure anything of value, or the use or enjoyment of any property or service from any automatic merchandise vending machine, postage-stamp machine, turnstile, fare box, coinbox telephone, parking meter or other lawful receptacle, depository, or contrivance designed to receive or to be operated by lawful coins or other currency of the United States, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

(b) Whoever manufactures, sells, offers, or advertises for sale, or exposes or keeps with intent to furnish or sell any token, slug, disk, device, paper, or other thing similar in size and shape to any of the lawful coins or other currency of the United States, or any token, disk, paper, or other device issued or authorized in connection with rationing or food and fiber distribution by any agency of the United States, with knowledge or reason to believe that such tokens, slugs, disks, devices, papers, or other things are intended to be used unlawfully or fraudulently to procure anything of value, or the use or enjoyment of any property or service from any automatic merchandise vending machine, postage-stamp machine, turnstile, fare box, coin-box telephone, parking meter, or other lawful receptacle, depository, or contrivance designed to receive or to be operated by lawful coins or other currency of the United States shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Nothing contained in this section shall create immunity from criminal prosecution under the laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(c) "Knowledge or reason to believe", within the meaning of paragraph (b) of this section, may be shown by proof that any law-enforcement officer has, prior to the commission of the offense with which the defendant is charged, informed the defendant that tokens, slugs, disks, or other devices of the kind manufactured, sold, offered, or advertised for sale by him or exposed or kept with intent to furnish or sell, are being used unlawfully or fraudulently to operate certain specified automatic

merchandise vending machines, postage-stamp machines, turnstiles, fare boxes, coin-box telephones, parking meters, or other receptacles, depositories, or contrivances, designed to receive or to be operated by lawful coins of the United States.

(As amended Sept. 19, 1962, Pub.L. 87-667, 76 Stat. 555.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 282, 282a (Mar. 4, 1909, ch. 321, § 168, 35 Stat. 1120, and § 168a as added Apr. 1, 1944, ch. 151, 58 Stat. 149).

Mandatory punishment provision in subsection (a) was rephrased in the alternative.

Sections were consolidated and changes were made in phraseology.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Punishment provision in paragraph (a) of 5 years was changed to 1 year to make the offense a misdemeanor as was done in paragraph (b) of this section, which represents the latest expression of the intention of Congress. See definition of felony and misdemeanor in section 1 of this title and note thereunder.

In paragraph (b) the $3,000 fine was reduced to $1,000 to conform to paragraph (a) and as more in keeping with the gravity of offense.

§ 492. Forfeiture of counterfeit paraphernalia

All counterfeits of any coins or obligations or other securities of the United States or of any foreign government, or any articles, devices, and other things made, possessed, or used in violation of this chapter or of sections 331–333, 335, 336, 642 or 1720, of this title, or any material or apparatus used or fitted or intended to be used, in the making of such counterfeits, articles, devices or things, found in the possession of any person without authority from the Secretary of the Treasury or other proper officer, shall be forfeited to the United States.

Whoever, having the custody or control of any such counterfeits, material, apparatus, articles, devices, or other things, fails or refuses to surrender possession thereof upon request by any authorized agent of the Treasury Department, or other proper officer, shall be fined not more than $100 or imprisoned not more than one year, or both.

Whenever, except as hereinafter in this section provided, any person interested in any article, device, or other thing, or material or apparatus seized under this section files with the Secretary of the Treasury, before the disposition thereof, a petition for the remission or mitigation of such forfeiture, the Secretary of the Treasury, if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or the mitigation of such forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just.

If the seizure involves offenses other than offenses against the coinage, currency, obligations or securities of the United States or any foreign government, the petition for the remission or mitigation of forfeiture shall be referred to the Attorney General, who may remit or mitigate the forfeiture upon such terms as he deems reasonable and just.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 286 (Mar. 4, 1909, ch. 321, § 172, 35 Stat. 1121; Jan. 27, 1938, ch. 10, § 4, 52 Stat. 7).

Section was materially shortened through merger of former third and fourth sentences with present first and second paragraphs by extending latter to include "articles, devices, and other things". This necessitated many insertions and deletions in the first two paragraphs, which, however, did not affect the substance of the section.

A reference in the former third sentence to violations of certain sections was broadened to read "in violation of this chapter or of sections 331–333, 335–336, 642, 1720, of this title" and incorporated in the first paragraph. This translation extends for the first time the provisions of this section to subject matter of sections 493–496, 498, 499, 504–509 of this title. All of the sections covered by the original reference in this section are represented in the translation except section 261, now section 8 of this title, and section 287 of title 18, U.S.C., 1940 ed., which were omitted therefrom as unnecessary, since the former is definitive and the latter related to procedure only, and is superseded by rule 41(a), (b) of the Federal Rules of Criminal Procedure.

The revised section was so written as to limit the authority of the Secretary of the Treasury to forfeitures within the enforcement powers of the Treasury Department, which advises that it does not investigate counterfeiting offenses not involving coins, currency, or Government obligations and securities. The Attorney General is the appropriate officer to remit or mitigate other forfeitures.

Changes in phraseology were also made.

§ 493. Bonds and obligations of certain lending agencies

Whoever falsely makes, forges, counterfeits or alters any note, bond, debenture, coupon, obligation, instrument, or writing in imitation or purporting to be in imitation of, a note, bond, debenture, coupon, obligation, instrument or writing, issued by the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, or any land

bank, intermediate credit bank, insured credit union, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Whoever passes, utters, or publishes, or attempts to pass, utter or publish any note, bond, debenture, coupon, obligation, instrument or document knowing the same to have been falsely made, forged, counterfeited or altered, contrary to the provisions of this section, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(As amended Oct. 4, 1961, Pub.L. 87-353, § 3(p), 75 Stat. 774; May 25, 1967, Pub.L. 90-19, § 24(a), 81 Stat. 27; Oct. 19, 1970, Pub.L. 91-468, § 3, 84 Stat. 1016.)

HISTORICAL AND REVISION NOTES

Based on sections 264(t), 982, 1126, 1138d(b), 1316, 1441(b), 1467(b), 1731(b) of title 12, U.S.C., 1940 ed., Banks and Banking, and section 616(b) of title 15, U.S.C. 1940 ed., Commerce and Trade (Dec. 23, 1913, ch. 6, § 12B(t), as added June 16, 1933, ch. 89, § 8, 48 Stat. 178, and amended Aug. 23, 1935, ch. 614, § 101, 49 Stat. 684; July 17, 1916, ch. 245, § 31 (second paragraph), 39 Stat. 383; July 17, 1916, ch. 245, § 211(f), as added Mar. 4, 1923, ch. 252, title I, § 2, 42 Stat. 1460; Mar. 4, 1923, ch. 252, title II, § 216(f), 42 Stat. 1472; Jan. 22, 1932, ch. 8, § 16(b), 47 Stat. 11; July 22, 1932, ch. 522, § 21(b), 47 Stat. 738; June 13, 1933, ch. 64, § 8(b), 48 Stat. 134; June 16, 1933, ch. 98, § 64(b), 48 Stat. 268; June 27, 1934, ch. 847, § 512(b), 48 Stat. 1265).

Each of the nine sections from which this section was derived contained similar provisions with respect to one or more named agencies or corporations. The punishment was the same in each section except that in sections 982, 1126, and 1316 of title 12, U.S.C., 1940 ed., Banks and Banking, the maximum fine was $5,000. This section adopts the $10,000 maximum fine provided in the other six former sections.

This section condenses and simplifies the form of the former sections without change of substance, except where the maximum fine differs as noted above.

The enumeration of "note, bond, debenture, coupon, obligation, instrument, or writing" does not occur in any one of the original sections but is an adequate enumeration of the instruments mentioned in each.

Certain specific agencies are enumerated by name as are "land bank, intermediate credit bank, bank for cooperatives," but the phrase "or any lending, mortgage, insurance, credit, or savings and loan corporation or association" was used to embrace the following: National Farm Loan Association, Federal Savings and Loan Insurance Corporation, Federal Savings and Loan Associations, National Agricultural Credit Corporation, Production Credit Corporations, Production Credit Associations, Home Loan Banks, National Mortgage Associations, and Central Bank for Cooperatives, Regional Agricultural Credit Corporation, or any instrumentalities created for similar purposes.

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary, such persons being principals by section 2 of this title.

The section was written in two paragraphs; the first denouncing forgery, counterfeiting, and altering; the second, passing, uttering, and publishing. This arrangement, together with the simplified style of the rewritten section, will permit the repeal of similar provisions in at least nine complicated sections now in title 12, U.S.C., 1940 ed., Banks and Banking.

Section 1138d(f) of title 12, U.S.C., 1940 ed., Banks and Banking, was omitted from this revision and recommended for repeal. It provides as follows: "Whoever conspires with another to accomplish any of the acts made unlawful by the preceding provisions of this section shall, on conviction thereof, be subject to the same fine or imprisonment, or both, as is applicable in the case of conviction for doing such unlawful act."

The only case construing such subsection (f) is *United States v. Halbrook*, D.C.Mo.1941, 36 F.Supp. 345, in which the District Judge said by way of obiter dictum in a footnote that "Under this section no overt act need be shown as is true in the case of a prosecution under section 37 of the Criminal Code", now section 371 of this title.

Indeed the indictment upon which Halbrook was acquitted was drawn under section 88 of title 18, U.S.C., 1940 ed., now section 371 of this title, which required allegation and proof of an overt act and provided punishment by fine of not more than $10,000, or imprisonment for not more than 2 years, or both. The second indictment charged only substantive violations and involved neither conspiracy section.

It will be noted that section 1138d(f) of title 12, U.S.C., 1940 ed., Banks and Banking, applies in terms only to the Farm Credit Administration, intermediate credit banks, Federal Farm Mortgage Corporation, and by reference to the banks for cooperatives, Production Credit Associations and Production Credit Corporations, and is not applicable to land banks, loan associations, Federal Housing Administration, Home Owners' Loan Corporation, or other institutions.

It is also noted that in the only reported case involving this section, the United States attorney drew his conspiracy indictment not under section 1138d(f) of title 12, U.S.C., 1940 ed., Banks and Banking, but under section 88 of title 18, U.S.C., 1940 ed., which is now section 371 of this title, indicating considerable doubt as to the scope and effect of section 1138d(f) of said title 12, U.S.C., 1940 ed., Banks and Banking.

There is no sound reason for differentiating between types of credit, insurance, banking and lending agencies in the punishment of conspiracy or in the requirement as to proof of overt acts. Since conspiracies involving offenses equally serious such as obstruction of justice, bribery, embezzlements, counterfeiting and false statements and offenses against the Treasury of the United States as well as the Federal Deposit Insurance Corporation and the Home Owners' Loan Corporation are punishable under the general conspiracy statute, the same rule should be applied to lesser agencies.

The blanket provision for punishment of "any person who willfully violates any other provision of this Act"

was omitted as useless, in view of the specific provisions for penalties elsewhere in the Act.

Abolition of Home Owners' Loan Corporation and Reconstruction Finance Corporation. The Home Owners' Loan Corporation and the Reconstruction Finance Corporation was dissolved and abolished.

§ 494. Contractors' bonds, bids, and public records

Whoever falsely makes, alters, forges, or counterfeits any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or

Whoever utters or publishes as true or possesses with intent to utter or publish as true, any such false, forged, altered, or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited; or

Whoever transmits to, or presents at any office or to any officer of the United States, any such false, forged, altered, or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 72 (Mar. 4, 1909, ch. 321, § 28, 35 Stat. 1094).

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Changes were also made in phraseology.

§ 495. Contracts, deeds, and powers of attorney

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 73 (Mar. 4, 1909, ch. 321, § 29, 35 Stat. 1094).

Reference in first paragraph to persons causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

§ 496. Customs matters

Whoever forges, counterfeits or falsely alters any writing made or required to be made in connection with the entry or withdrawal of imports or collection of customs duties, or uses any such writing knowing the same to be forged, counterfeited or falsely altered, shall be fined not more than $10,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 119 (Mar. 4, 1909, ch. 321, § 63, 35 Stat. 1100).

Section was rewritten to apply to all customs documents or writings. The Treasury Department advises that certificates of entry are obsolete.

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

§ 497. Letters patent

Whoever falsely makes, forges, counterfeits, or alters any letters patent granted or purporting to have been granted by the President of the United States; or

Whoever passes, utters, or publishes, or attempts to pass, utter, or publish as genuine, any such letters patent, knowing the same to be forged, counterfeited or falsely altered—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 71 (Mar. 4, 1909, ch. 321, § 27, 35 Stat. 1094).

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

§ 498. Military or naval discharge certificates

Whoever forges, counterfeits, or falsely alters any certificate of discharge from the military or naval service of the United States, or uses, unlawfully possesses or exhibits any such certificate,

knowing the same to be forged, counterfeited, or falsely altered, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES.

Based on title 18, U.S.C., 1940 ed., § 136 (Mar. 4, 1917, ch. 180, 39 Stat. 1182).

Reference to any person causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

At the end of this section words "in the discretion of the court" were omitted as unnecessary, as the punishment provisions, being framed in the alternative by the use of the disjunctive "or," vest in the court the power to impose a fine or prison sentence in its discretion.

Changes in phraseology were made.

§ 499. Military, naval, or official passes

Whoever falsely makes, forges, counterfeits, alters, or tampers with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with intent to defraud uses or possesses any such pass or permit, or personates or falsely represents himself to be or not to be a person to whom such pass or permit has been duly issued, or willfully allows any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 132 (June 15, 1917, ch. 30, title X, § 3, 40 Stat. 228).

Changes were made in phraseology.

§ 500. Money orders

Whoever, with intent to defraud, falsely makes, forges, counterfeits, engraves, or prints any order in imitation of or purporting to be a blank money order or a money order issued by or under the direction of the Post Office Department or Postal Service; or

Whoever forges or counterfeits the signature or initials of any person authorized to issue money orders upon or to any money order, postal note, or blank therefor provided or issued by or under the direction of the Post Office Department or Postal Service, or post office department or corporation of any foreign country, and payable in the United States, or any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereof; or

Whoever falsely alters, in any material respect, any such money order or postal note; or

Whoever, with intent to defraud, passes, utters or publishes or attempts to pass, utter or publish any such forged or altered money order or postal note, knowing any material initials, signature, stamp impression or indorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; or

Whoever issues any money order or postal note without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States or Postal Service, or any officer, employee, or agent thereof, any sum of money whatever; or

Whoever embezzles, steals, or knowingly converts to his own use or to the use of another, or without authority converts or disposes of any blank money order form provided by or under the authority of the Post Office Department or Postal Service; or

Whoever receives or possesses any such money order form with the intent to convert it to his own use or gain or use or gain of another knowing it to have been embezzled, stolen or converted; or

Whoever, with intent to defraud the United States, the Postal Service, or any person, transmits, presents, or causes to be transmitted or presented, any money order or postal note knowing the same—

(1) to contain any forged or counterfeited signature, initials, or any stamped impression, or

(2) to contain any material alteration therein unlawfully made, or

(3) to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, or

(4) to have been stamped without lawful authority; or

Whoever steals, or with intent to defraud or without being lawfully authorized by the Post Office Department or Postal Service, receives, possesses, disposes of or attempts to dispose of any postal money order machine or any stamp, tool, or instrument specifically designed to be used in preparing or filling out the blanks on postal money order forms—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(5), 84 Stat. 777; Sept. 23, 1972, Pub.L. 92-430, 86 Stat. 722.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 347 (Mar. 4, 1909, ch. 321, § 218, 35 Stat. 1131).

References to persons causing, procuring, aiding or assisting were omitted as unnecessary as such persons are made principals by section 2 of this title.

Changes were made in phraseology.

Change of Name. The Post Office Department has been redesignated the United States Postal Service.

§ 501. Postage stamps, postage meter stamps, and postal cards

Whoever forges or counterfeits any postage stamp, postage meter stamp, or any stamp printed upon any stamped envelope, or postal card, or any die, plate, or engraving thereof; or

Whoever makes or prints, or knowingly uses or sells, or possesses with intent to use or sell, any such forged or counterfeited postage stamp, postage meter stamp, stamped envelope, postal card, die, plate, or engraving; or

Whoever makes, or knowingly uses or sells, or possesses with intent to use or sell, any paper bearing the watermark of any stamped envelope, or postal card, or any fraudulent imitation thereof; or

Whoever makes or prints, or authorizes to be made or printed, any postage stamp, postage meter stamp, stamped envelope, or postal card, of the kind authorized and provided by the Post Office Department or by the Postal Service, without the special authority and direction of the Department or Postal Service; or

Whoever after such postage stamp, postage meter stamp, stamped envelope, or postal card has been printed, with intent to defraud, delivers the same to any person not authorized by an instrument in writing, duly executed under the hand of the Postmaster General and the seal of the Post Office Department or the Postal Service, to receive it—

Shall be fined not more that $500 or imprisoned not more than five years, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(6), 84 Stat. 777; Oct. 14, 1970, Pub.L. 91-448, § 1(a), 84 Stat. 920.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 348 (Mar. 4, 1909, ch. 321, § 219, 35 Stat. 1132).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes of phraseology were made.

Change of Name. The Post Office Department has been redesignated the United States Postal Service.

§ 502. Postage and revenue stamps of foreign governments

Whoever forges, or counterfeits, or knowingly utters or uses any forged or counterfeit postage stamp or revenue stamp of any foreign government, shall be fined not more than $500 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 349 (Mar. 4, 1909, ch. 321, § 220, 35 Stat. 1132; May 26, 1926, ch. 396, 44 Stat. 653).

A paragraph defining "foreign government" was combined with other like provisions to form section 11 of this title. A proviso against repeal, "Provided, however, That nothing in this section shall be held to repeal or modify section 350 of this title [now section 504 of this title]", was deleted as unnecessary since that section by express reference to this one makes it clear that these sections are in pari materia.

Minor changes in phraseology were also made.

§ 503. Postmarking stamps

Whoever forges or counterfeits any postmarking stamp, or impression thereof with intent to make it appear that such impression is a genuine postmark, or makes or knowingly uses or sells, or possesses with intent to use or sell, any forged or counterfeited postmarking stamp, die, plate, or engraving, or such impression thereof, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 349a (Aug. 26, 1935, ch. 692, 49 Stat. 866).

Minor changes in phraseology were made.

§ 504. Printing and filming of United States and foreign obligations and securities

Notwithstanding any other provision of this chapter, the following are permitted:

(1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—

(A) postage stamps of the United States,

(B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,

for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for adver-

tising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government and stamps issued under the Migratory Bird Hunting Stamp Act of 1934 may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color and illustrations of stamps issued under the Migratory Bird Hunting Stamp Act of 1934 in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term "postage stamp" includes postage meter stamps.

(As amended Sept. 2, 1958, Pub.L. 85–921, § 1, 72 Stat. 1771; June 20, 1968, Pub.L. 90–353, § 1, 82 Stat. 240; Oct. 14, 1970, Pub.L. 91–448, § 2, 84 Stat. 921; July 18, 1984, Pub.L. 98–369, Title X, § 1077(b)(1), (2), 98 Stat. 1054.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 350 (Mar. 3, 1923, ch. 218, 42 Stat. 1437; Jan. 27, 1938, ch. 10, § 2, 52 Stat. 6).

Minor changes in phraseology were made.

References in Text. The Migratory Bird Hunting Stamp Act of 1934, referred to in par. (1)(D)(i) and (ii), is Act Mar. 16, 1934, c. 71, 48 Stat. 452, as amended, which is classified generally to subchapter IV (§ 718 et seq.) of chapter 7 of Title 16, Conservation.

Effective Date of 1984 Amendment. Amendment by Pub.L. 98–369 effective July 18, 1984, pursuant to section 1077(c) of Pub.L. 98–369.

§ 505. Seals of courts; signatures of judges or court officers

Whoever forges the signature of any judge, register, or other officer of any court of the United States, or of any Territory thereof, or forges or counterfeits the seal of any such court, or knowingly concurs in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document, or tenders in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 236 (Mar. 4, 1909, ch. 321, § 130, 35 Stat. 1112).

Mandatory punishment provision was rephrased in the alternative.

Minor changes of phraseology were made.

§ 506. Seals of departments or agencies

Whoever falsely makes, forges, counterfeits, mutilates, or alters the seal of any department or agency of the United States; or

Whoever knowingly uses, affixes, or impresses any such fraudulently made, forged, counterfeited, mutilated, or altered seal to or upon any certificate, instrument, commission, document, or paper, of any description; or

Whoever, with fraudulent intent, possesses any such seal, knowing the same to have been so falsely made, forged, counterfeited, mutilated, or altered—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 131 (June 15, 1917, ch. 30, title X, § 2, 40 Stat. 228).

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary as such persons are made principals by section 2 of this title.

In view of definitions of department and agency in section 6 of this title, words "department or agency" in first paragraph were substituted for "executive department, or any bureau, commission, or office".

Provision for 10 years' imprisonment was reduced to 5 years to conform to punishment provision in section 505 of this title, covering an offense of like gravity.

Minor changes in phraseology were also made.

§ 507. Ship's papers

Whoever falsely makes, forges, counterfeits, or alters any instrument in imitation of or purporting to be, an abstract or official copy or certificate of the recording, registry, or enrollment of any vessel, in the office of any collector of the customs, or a license to any vessel for carrying on the coasting trade or fisheries of the United States, or a certificate of ownership, pass, or clearance, granted for any vessel, under the authority of the United States, or a permit, debenture, or other official document granted by any collector or other officer of the customs by virtue of his office; or

Whoever utters, publishes, or passes, or attempts to utter, publish, or pass, as true, any such false, forged, counterfeited, or falsely altered instrument, abstract, official copy, certificate, license, pass, clearance, permit, debenture, or other official document herein specified, knowing the same to be false, forged, counterfeited, or falsely altered, with an intent to defraud—

Shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 129 (Mar. 4, 1909, ch. 321, § 72, 35 Stat. 1101).

The words "passport" and "sea letter" were omitted as obsolete, in view of the Presidential proclamation of April 10, 1815, discontinuing the use of such passports and sea letters.

Mandatory punishment provisions were rephrased in the alternative.

Minor changes of phraseology were made.

Transfer of Functions. All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise in the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, to be terminated not later than Dec. 31, 1966. All functions of the offices so eliminated were already vested in the Secretary of the Treasury.

§ 508. Transportation requests of Government

Whoever falsely makes, forges, or counterfeits in whole or in part, any form or request in similitude of the form or request provided by the Government for requesting a common carrier to furnish transportation on account of the United States or any department or agency thereof, or knowingly alters any form or request provided by the Government for requesting a common carrier to furnish transportation on account of the United States or any department or agency thereof; or

Whoever knowingly passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, any such false, forged, counterfeited, or altered form or request—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 146 (Dec. 11, 1926, ch. 2, § 1, 44 Stat. 917).

References to persons causing, procuring, aiding or assisting were omitted as unnecessary as such persons are made principals by section 2 of this title.

Also, in first paragraph, word "agency" was substituted for "branch", in view of definitions of department and agency in section 6 of this title.

Words "upon conviction" in last paragraph were omitted as surplusage since punishment cannot be imposed until a conviction is secured.

Minor changes of phraseology were also made.

§ 509. Possessing and making plates or stones for Government transportation requests

Whoever, except by lawful authority, controls, holds or possesses any plate, stone, or other thing, or any part thereof, from which has been printed or may be printed any form or request for Government transportation, or uses such plate, stone, or other thing, or knowingly permits or suffers the same to be used in making any such form or request or any part of such a form or request; or

Whoever makes or engraves any plate, stone, or thing, in the likeness of any plate, stone, or thing designated for the printing of the genuine issues of the form or request for Government transportation; or

Whoever prints, photographs, or in any other manner makes, executes, or sells any engraving, photograph, print, or impression in the likeness of any genuine form or request for Government transportation, or any part thereof; or

Whoever brings into the United States or any place subject to the jurisdiction thereof, any plate, stone, or other thing, or engraving, photograph, print, or other impression of the form or request for Government transportation—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 147 (Dec. 11, 1926, ch. 2, § 2, 44 Stat. 918).

References to persons causing, procuring, aiding or assisting were omitted as unnecessary as such persons are made principals by section 2 of this title.

Words "upon conviction" in last paragraph were omitted as surplusage since punishment cannot be imposed until a conviction is secured.

Minor changes in phraseology were also made.

§ 510. Forging endorsements on Treasury checks or bonds or securities of the United States

(a) Whoever, with intent to defraud—

(1) falsely makes or forges any endorsement or signature on a Treasury check or bond or security of the United States; or

(2) passes, utters, or publishes, or attempts to pass, utter, or publish, any Treasury check or bond or security of the United States bearing a falsely made or forged endorsement or signature shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) Whoever, with knowledge that such Treasury check or bond or security of the United States is stolen or bears a falsely made or forged endorsement or signature buys, sells, exchanges, receives, delivers, retains, or conceals any such Treasury check or bond or security of the United States that in fact is stolen or bears a forged or falsely made endorsement or signature shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(c) If the face value of the Treasury check or bond or security of the United States or the aggregate face value, if more than one Treasury check or bond or security of the United States, does not exceed $500, in any of the above-mentioned offenses, the penalty shall be a fine of not more than $1,000 or imprisonment for not more than one year, or both.

(Added Pub.L. 98–151, § 115(a), Nov. 14, 1983, 98 Stat. 977.)

§ 511.[1] Securities of the States and private entities

(a) Whoever makes, utters or possesses a counterfeited security of a State or a political subdivision thereof or of an organization, or whoever makes, utters or possesses a forged security of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government shall be fined not more than $250,000 or imprisoned for not more than ten years, or both.

(b) Whoever makes, receives, possesses, sells or otherwise transfers an implement designed for or particularly suited for making a counterfeit or forged security with the intent that it be so used shall be punished by a fine of not more than $250,000 or by imprisonment for not more than ten years, or both.

(c) For purposes of this section—

(1) the term "counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

(2) the term "forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents;

(3) the term "security" means—

(A) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693(c)), money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement collateral-trust certificate, pre-reorganization certificate of subscription, transferable share, investment contract, voting trust certificate, or certificate of interest in tangible or intangible property;

(B) an instrument evidencing ownership of goods, wares, or merchandise;

(C) any other written instrument commonly known as a security;

(D) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or

(E) a blank form of any of the foregoing;

(4) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, or any other association or persons which operates in or the activities of which affect interstate or foreign commerce; and

(5) the term "State" includes a State of the United States, the District of Columbia, Puerto

Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

(Added Pub.L. 98-473, Title II, § 1105(a), Oct. 12, 1984, 98 Stat. 2144.)

[1] Another section 511 is set out post.

§ 511.[1] Altering or removing motor vehicle identification numbers

(a) Whoever knowingly removes, obliterates, tampers with, or alters an identification number for a motor vehicle, or motor vehicle part, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b)(1) Subsection (a) of this section does not apply to a removal, obliteration, tampering, or alteration by a person specified in paragraph (2) of this subsection (unless such person knows that the vehicle or part involved is stolen).

(2) The persons referred to in paragraph (1) of this subsection are—

(A) a motor vehicle scrap processor or a motor vehicle demolisher who complies with applicable State law with respect to such vehicle or part;

(B) a person who repairs such vehicle or part, if the removal, obliteration, tampering, or alteration is reasonably necessary for the repair; and

(C) a person who restores or replaces an identification number for such vehicle or part in accordance with applicable State law.

(c) As used in this section, the term—

(1) "identification number" means a number or symbol that is inscribed or affixed for purposes of identification under the National Traffic and Motor Vehicle Safety Act of 1966, or the Motor Vehicle Information and Cost Savings Act;

(2) "motor vehicle" has the meaning given that term in section 2 of the Motor Vehicle Information and Cost Savings Act;

(3) "motor vehicle demolisher" means a person, including any motor vehicle dismantler or motor vehicle recycler, who is engaged in the business of reducing motor vehicles or motor vehicle parts to metallic scrap that is unsuitable for use as either a motor vehicle or a motor vehicle part;

(4) "motor vehicle scrap processor" means a person—

(A) who is engaged in the business of purchasing motor vehicles or motor vehicle parts for reduction to metallic scrap for recycling;

(B) who, from a fixed location, uses machinery to process metallic scrap into prepared grades; and

(C) whose principal product is metallic scrap for recycling;

but such term does not include any activity of any such person relating to the recycling of a motor vehicle or a motor vehicle part as a used motor vehicle or a used motor vehicle part.

(Added Pub.L. 98-547, Title II, § 201(a), Oct. 25, 1984, 98 Stat. 2768.)

[1] Another section 511 is set out ante.

References in Text. The National Traffic and Motor Vehicle Safety Act of 1966, referred to in subsec. (c)(1), is Pub.L. 89-563, Sept. 9, 1966, 80 Stat. 718, which is classified principally to chapter 38 (§ 1381 et seq.) of Title 15, Commerce and Trade.

The Motor Vehicle Information and Cost Savings Act, referred to in subsec. (c)(1), is Pub.L. 92-513, Oct. 20, 1972, 86 Stat. 947, which is classified generally to chapter 46 (§ 1901 et seq.) of Title 15, Commerce and Trade. Section 2 of the Motor Vehicle Information and Cost Savings Act, referred to in subsec. (c)(2), is classified to section 1901 of Title 15.

§ 512. Forfeiture of certain motor vehicles and motor vehicle parts

(a) If an identification number for a motor vehicle or motor vehicle part is removed, obliterated, tampered with, or altered, such vehicle or part shall be subject to seizure and forfeiture to the United States unless—

(1) in the case of a motor vehicle part, such part is attached to a motor vehicle and the owner of such motor vehicle does not know that the identification number has been removed, obliterated, tampered with, or altered;

(2) such motor vehicle or part has a replacement identification number that—

(A) is authorized by the Secretary of Transportation under the National Traffic and Motor Vehicle Safety Act of 1966; or

(B) conforms to applicable State law;

(3) such removal, obliteration, tampering, or alteration is caused by collision or fire or is carried out as described in section 511(b) of this title; or

(4) such motor vehicle or part is in the possession or control of a motor vehicle scrap processor who does not know that such identification number was removed, obliterated, tampered with, or altered in any manner other than by collision or fire or as described in section 511(b) of this title.

(b) All provisions of law relating to—

(1) the seizure and condemnation of vessels, vehicles, merchandise, and baggage for violation of customs laws, and procedures for summary and judicial forfeiture applicable to such violations;

(2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such disposition;

(3) the remission or mitigation of such forfeiture; and

(4) the compromise of claims and the award of compensation to informers with respect to such forfeiture;

shall apply to seizures and forfeitures under this section, to the extent that such provisions are not inconsistent with this section. The duties of the collector of customs or any other person with respect to seizure and forfeiture under such provisions shall be performed under this section by such persons as may be designated by the Attorney General.

(c) As used in this section, the terms "identification number", "motor vehicle", and "motor vehicle scrap processor" have the meanings given those terms in section 511 of this title.

(Added Pub.L. 98–547, Title II, § 201(a), Oct. 25, 1984, 98 Stat. 2769.)

References in Text. The National Traffic and Motor Vehicle Safety Act of 1966, referred to in subsec. (a)(2)(A), is Pub.L. 89–563, Sept. 9, 1966, 80 Stat. 718, which is classified principally to chapter 38 (§ 1381 et seq.) of Title 15, Commerce and Trade.

CHAPTER 27—CUSTOMS

Sec.

541. Entry of goods falsely classified.
542. Entry of goods by means of false statements.
543. Entry of goods for less than legal duty.
544. Relanding of goods.
545. Smuggling goods into the United States.
546. Smuggling goods into foreign countries.
547. Depositing goods in buildings on boundaries.
548. Removing or repacking goods in warehouses.
549. Removing goods from customs custody; breaking seals.
550. False claim for refund of duties.
551. Concealing or destroying invoices or other papers.
552. Officers aiding importation of obscene or treasonous books and articles.
553. Importation or exportation of stolen motor vehicles, off-highway mobile equipment, vessels, or aircraft.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 541. Entry of goods falsely classified

Whoever knowingly effects any entry of goods, wares, or merchandise, at less than the true weight or measure thereof, or upon a false classification as to quality or value, or by the payment of less than the amount of duty legally due, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 126 (Mar. 4, 1909, ch. 321, § 69, 35 Stat. 1101).

Reference to persons aiding, contained in words "or aid in effecting," was omitted as unnecessary as such persons are made principals by section 2 of this title.

Changes were made in phraseology.

§ 542. Entry of goods by means of false statements

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

(As amended June 30, 1955, c. 258, § 2(c), 69 Stat. 242.)

Historical and Revision Notes

Based on section 1591 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 591, 46 Stat. 750; Aug. 5, 1935, ch. 438, title III, § 304(a), 49 Stat. 527).

The reference in the first paragraph to persons aiding, contained in the phrase "or aids," was omitted as unnecessary as such persons are made principals by section 2 of this title.

Words "upon conviction" before "be fined" were omitted as surplusage since punishment cannot be imposed until conviction is secured.

Enumeration of persons at beginning of section and provision preserving forfeitures where authorized by law were omitted as surplusage.

The fourth paragraph was added to the revised section to make clear the intent of Congress that forfeiture is an additional consequence independent of the criminal punishment.

The final paragraph was added to conform with section 1709 of title 19, U.S.C., 1940 ed.

Changes in phraseology were also made.

References in Text. The Philippine Islands, referred to in text, are now independent.

§ 543. Entry of goods for less than legal duty

Whoever, being an officer of the revenue, knowingly admits to entry, any goods, wares, or merchandise, upon payment of less than the amount of duty legally due, shall be fined not more than $5,000 or imprisoned not more than two years, or both; and removed from office.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 125 (Mar. 4, 1909, ch. 321, § 68, 35 Stat. 1101).

Reference to persons aiding, contained in words "or aid in admitting," was omitted as unnecessary as such persons are made principals by section 2 of this title.

Changes were made in phraseology.

§ 544. Relanding of goods

If any merchandise entered or withdrawn for exportation without payment of the duties thereon, or with intent to obtain a drawback of the duties paid, or of any other allowances given by law on the exportation thereof, is relanded at any place in the United States without entry having been made, such merchandise shall be considered as having been imported into the United States contrary to law, and each person concerned shall be fined not more than $5,000 or imprisoned not more than two years, or both; and such merchandise shall be forfeited.

The term "any place in the United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

(As amended June 30, 1955, c. 258, § 2(c), 69 Stat. 242.)

Historical and Revision Notes

Based on section 1589 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 589, 46 Stat. 750).

The final paragraph was added to conform with section 1709 of title 19, U.S.C., 1940 ed.

Minor changes were made in phraseology.

References in Text. The Philippine Islands, referred to in text, are now independent.

§ 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

(As amended Aug. 24, 1954, c. 890, § 1, 68 Stat. 782; Sept. 1, 1954, c. 1213, Title V, § 507, 68 Stat. 1141; June 30, 1955, c. 258, § 2(c), 69 Stat. 242.)

Historical and Revision Notes

Based on section 1593 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 593, 46 Stat. 751).

Reference in first paragraph to aiders, contained in words "his, her, or their aiders and abettors" was omitted as unnecessary since such persons are made principals by section 2 of this title. For the same reason words "or assists in so doing" in second paragraph were deleted.

Words "shall be deemed guilty of a misdemeanor," in first paragraph were omitted in view of definition of misdemeanor in section 1 of this title.

Conviction provision in first paragraph reading "and on conviction thereof" was deleted as surplusage since punishment cannot be imposed until a conviction is secured.

Minimum punishment provision "nor less than $50" in second paragraph was deleted.

Forfeiture provision was rephrased to make it clear that forfeiture was not dependent upon conviction.

The final paragraph was added to conform with section 1709 of title 19, U.S.C., 1940 ed.

Changes were made in phraseology.

References in Text. The Philippine Islands, referred to in text, are now independent.

§ 546. Smuggling goods into foreign countries

Any person owning in whole or in part any vessel of the United States who employs, or participates in, or allows the employment of, such vessel for the purpose of smuggling, or attempting to smuggle, or assisting in smuggling, any merchandise into the territory of any foreign government in violation of the laws there in force, if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue, and any citizen of, or person domiciled in, or any corporation incorporated in, the United States, controlling or substantially participating in the control of any such vessel, directly or indirectly, whether through ownership of corporate shares or otherwise, and allowing the employment of said vessel for any such purpose, and any person found, or discovered to have been, on board of any such vessel so employed and participating or assisting in any such purpose, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

It shall constitute an offense under this section to hire out or charter a vessel if the lessor or charterer has knowledge or reasonable grounds for belief that the lessee or person chartering the vessel intends to employ such vessel for any of the purposes described in this section and if such vessel is, during the time such lease or charter is in effect, employed for any such purpose.

Historical and Revision Notes

Based on section 1702 of title 19, U.S.C., 1940 ed., Customs Duties (Aug. 5, 1935, ch. 438, title I, § 2, 49 Stat. 518).

Changes were made in phraseology.

§ 547. Depositing goods in buildings on boundaries

Whoever receives or deposits any merchandise in any building upon the boundary line between the United States and any foreign country, or carries any merchandise through the same, in violation of law, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on section 1596 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 596, 46 Stat. 752).

Reference to persons aiding, contained in words "or aids therein," was omitted as such persons are made principals by section 2 of this title.

Changes were made in phraseology.

§ 548. Removing or repacking goods in warehouses

Whoever fraudulently conceals, removes, or repacks merchandise in any bonded warehouse or fraudulently alters, defaces or obliterates any marks or numbers placed upon packages deposited in such warehouse, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Merchandise so concealed, removed, or repacked, or packages upon which any marks or numbers have been so altered, defaced, or obliterated, shall be forfeited to the United States.

Historical and Revision Notes

Based on section 1597 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 597, 46 Stat. 752).

This section was rewritten to place the criminal provisions ahead of the forfeiture provisions. This did not require any substantive changes except omission of reference to persons aiding. Such persons are made principals by section 2 of this title.

The punishment prescribed by section 545 of this title was inserted to make this section complete without reference to another section. In doing so it was necessary to rephrase the punishment provision of section 545 of this title, as originally enacted, without change of substance.

Forfeiture provision was rephrased to make it clear that forfeiture was not dependent upon conviction.

Changes were made in phraseology.

§ 549. Removing goods from customs custody; breaking seals

Whoever, without authority, affixes or attaches a customs seal, fastening, or mark, or any seal, fastening, or mark purporting to be a customs seal, fastening, or mark to any vessel, vehicle, warehouse, or package; or

Whoever, without authority, willfully removes, breaks, injures, or defaces any customs seal or other fastening or mark placed upon any vessel, vehicle, warehouse, or package containing merchandise or baggage in bond or in customs custody; or

Whoever maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, or unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs custody or control; or

Whoever receives or transports any merchandise or baggage unlawfully removed from any such

vessel, vehicle, or warehouse, knowing the same to have been unlawfully removed—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on section 1598 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 598, 46 Stat. 752; June 25, 1938, ch. 679, § 26, 52 Stat. 1089).

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

In view of definition of felony in section 1 of this title words "guilty of a felony" were omitted. (See reviser's note under section 550 of this title.)

The punishment prescribed by section 545 of this title was inserted to make this section complete without reference to another section. In doing so it was necessary to rephrase the punishment provision of section 545 of this title, as originally enacted, without change of substance.

Forfeiture provision was omitted to conform with current administrative practice.

Changes were made in phraseology.

§ 550. False claim for refund of duties

Whoever knowingly and willfully files any false or fraudulent entry or claim for the payment of drawback, allowance, or refund of duties upon the exportation of merchandise, or knowingly or willfully makes or files any false affidavit, abstract, record, certificate, or other document, with a view to securing the payment to himself or others of any drawback, allowance, or refund of duties, on the exportation of merchandise, greater than that legally due thereon, shall be fined not more than $5,000 or imprisoned not more than two years, or both, and such merchandise or the value thereof shall be forfeited.

HISTORICAL AND REVISION NOTES

Based on section 1590 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 590, 46 Stat. 750).

Reference to felony, contained in words "such person shall be guilty of a felony" was omitted as unnecessary in view of definition of felony in section 1 of this title. This, too, was the policy adopted by the codifiers of the 1909 Criminal Code. (See S.Rept.10, pt. I, pp. 12, 13, and 14, 60th Cong., 1st sess.)

Words "and upon conviction thereof" before "shall be punished" were also omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Changes were made in phraseology.

§ 551. Concealing or destroying invoices or other papers

Whoever willfully conceals or destroys any invoice, book, or paper relating to any merchandise imported into the United States, after an inspection thereof has been demanded by the collector of any collection district; or

Whoever conceals or destroys at any time any such invoice, book, or paper for the purpose of suppressing any evidence of fraud therein contained—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 120 (Mar. 4, 1909, ch. 321, § 64, 35 Stat. 1100).

Minor changes were made in phraseology.

Transfer of Functions. All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise in the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, to be terminated not later than Dec. 31, 1966. All functions of the offices so eliminated were already vested in the Secretary of the Treasury.

§ 552. Officers aiding importation of obscene or treasonous books and articles

Whoever, being an officer, agent, or employee of the United States, knowingly aids or abets any person engaged in any violation of any of the provisions of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail obscene or indecent publications or representations, or books, pamphlets, papers, writings, advertisements, circulars, prints, pictures, or drawings containing any matter advocating or urging treason or insurrection against the United States or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or means for procuring abortion, or other articles of indecent or immoral use or tendency, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

(As amended Jan. 8, 1971, Pub.L. 91-662, § 2, 84 Stat. 1973.)

HISTORICAL AND REVISION NOTES

Based on section 1305(b) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title III, § 305(b), 46 Stat. 688).

In view of definition of misdemeanor in section 1 of this title words "shall be deemed guilty of a misdemeanor, and" were omitted.

Words "at hard labor" after "imprisonment" were omitted. (See reviser's note under section 1 of this title.)

Changes were made in phraseology.

§ 553. Importation or exportation of stolen motor vehicles, off-highway mobile equipment, vessels, or aircraft

(a) Whoever knowingly imports, exports, or attempts to import or export—

(1) any motor vehicle, off-highway mobile equipment, vessel, aircraft, or part of any motor vehicle, off-highway mobile equipment, vessel, or aircraft, knowing the same to have been stolen; or

(2) any motor vehicle or off-highway mobile equipment or part of any motor vehicle or off-highway mobile equipment, knowing that the identification number of such motor vehicle, equipment, or part has been removed, obliterated, tampered with, or altered;

shall be fined not more than $15,000 or imprisoned not more than five years, or both.

(b) Subsection (a)(2) shall not apply if the removal, obliteration, tampering, or alteration—

(1) is caused by collision or fire; or

(2) is not a violation of section 511 of this title.

(c) As used in this section, the term—

(1) "motor vehicle" has the meaning given that term in section 2 of the Motor Vehicle Information and Cost Savings Act;

(2) "off-highway mobile equipment" means any self-propelled agricultural equipment, self-propelled construction equipment, and self-propelled special use equipment, used or designed for running on land but not on rail or highway;

(3) "vessel" has the meaning given that term in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401);

(4) "aircraft" has the meaning given that term in section 101 of the Federal Aviation Act of 1958 (49 U.S.C.App. 1301); and

(5) "identification number"—

(A) in the case of a motor vehicle, has the meaning given that term in section 511 of this title; and

(B) in the case of any other vehicle or equipment covered by this section, means a number or symbol assigned to the vehicle or equipment, or part thereof, by the manufacturer primarily for the purpose of identifying such vehicle, equipment, or part.

(Added Pub.L. 98-547, Title III, § 301(a), Oct. 25, 1984, 98 Stat. 2771.)

References in Text. Section 2 of the Motor Vehicle Information and Cost Savings Act, referred to in subsec. (c)(1), is section 2 of Pub.L. 92-513, Oct. 20, 1972, 86 Stat. 947, which is classified to section 1901 of Title 15, Commerce and Trade.

CHAPTER 29—ELECTIONS AND POLITICAL ACTIVITIES

Sec.
[591. Repealed.]
592. Troops at polls.
593. Interference by armed forces.
594. Intimidation of voters.
595. Interference by administrative employees of Federal, State, or Territorial Governments.
596. Polling armed forces.
597. Expenditures to influence voting.
598. Coercion by means of relief appropriations.
599. Promise of appointment by candidate.
600. Promise of employment or other benefit for political activity.
601. Deprivation of employment or other benefit for political contribution.
602. Solicitation of political contributions.
603. Place of solicitation.[1]
604. Solicitation from persons on relief.
605. Disclosure of names of persons on relief.
606. Intimidation to secure political contributions.
607. Making political contributions.[1]
[608 to 617. Repealed.]

[1] Catchlines amended without corresponding amendments of section analysis.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

[§ 591. Repealed. Pub.L. 96-187, Title II, § 201(a)(1), Jan. 8, 1980, 93 Stat. 1367]

§ 592. Troops at polls

Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

This section shall not prevent any officer or member of the armed forces of the United States from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 55 and 59 (Mar. 4, 1909, ch. 321, §§ 22, 26, 35 Stat. 1092, 1093).

This section consolidates sections 55 and 59 of title 18, U.S.C., 1940 ed.

Mandatory punishment provision was rephrased in the alternative.

In second paragraph, words "or member of the Armed Forces of the United States" were substituted for "soldier, sailor, or marine" so as to cover those auxiliaries which are now component parts of the Army and Navy.

Changes in phraseology were also made.

§ 593. Interference by armed forces

Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States.

This section shall not prevent any officer or member of the Armed Forces from exercising the right of suffrage in any district to which he may belong, if otherwise qualified according to the laws of the State of such district.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 56–59 (Mar. 4, 1909, ch. 321, §§ 23–26, 35 Stat. 1092, 1093).

Four sections were consolidated with only such changes of phraseology as were necessary to effect the consolidation.

§ 594. Intimidation of voters

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended Sept. 22, 1970, Pub.L. 91–405, Title II, § 204(d)(5), 84 Stat. 853.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 61, 61g (Aug. 2, 1939, 11:50 a.m. E.S.T., ch. 410, §§ 1, 8, 53 Stat. 1147, 1148).

This section consolidates sections 61 and 61g of title 18, U.S.C., 1940 ed., with changes in phraseology only.

§ 595. Interference by administrative employees of Federal, State, or Territorial Governments

Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prohibit or make unlawful any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any state or political subdivision thereof, or by the District of Columbia or by any Territory or Possession of the United States; or by any recognized religious, philanthropic or cultural organization.

(As amended Sept. 22, 1970, Pub.L. 91–405, Title II, § 204(d)(6), 84 Stat. 853.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 61a, 61g, 61n, 61s, 61u (Aug. 2, 1939, 11:50 a.m., E.S.T., ch. 410, §§ 2, 8, 53 Stat. 1147, 1148; July 19, 1940, ch. 640, § 1, 54 Stat.

767; Aug. 2, 1939, ch. 410, §§ 14, 19, as added July 19, 1940, ch. 640, § 4, 54 Stat. 767; Aug. 2, 1939, ch. 410, § 21, as added Oct. 24, 1942, ch. 620, 56 Stat. 986).

This section consolidates sections 61s, 61n, and 61g with 61a, all of title 18, U.S.C., 1940 ed., in first paragraph, and incorporates section 61u as second paragraph.

Words "or agency thereof" and words "or any department or agency thereof" were inserted to remove any possible ambiguity as to scope of section. (See definitions of department and agency in section 6 of this title.)

Words "or by the District of Columbia or any agency or instrumentality thereof" were inserted upon authority of section 61n of title 18, U.S.C., 1940 ed., which provided that for the purposes of this section, "persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States."

After "State" the words "Territory, or Possession of the United States" were inserted in two places upon authority of section 61s of title 18, U.S.C., 1940 ed., which defined "State," as used in this section, as "any State, Territory, or possession of the United States."

The punishment provision was derived from section 61g of title 18, U.S.C., 1940 ed., which, by reference, made this punishment applicable to this section.

The second paragraph was derived from section 61u of title 18, U.S.C., 1940 ed., which made its provisions applicable to this section by reference.

Changes were made in phraseology.

§ 596. Polling armed forces

Whoever, within or without the Armed Forces of the United States, polls any member of such forces, either within or without the United States, either before or after he executes any ballot under any Federal or State law, with reference to his choice of or his vote for any candidate, or states, publishes, or releases any result of any purported poll taken from or among the members of the Armed Forces of the United States or including within it the statement of choice for such candidate or of such votes cast by any member of the Armed Forces of the United States, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

The word "poll" means any request for information, verbal or written, which by its language or form of expression requires or implies the necessity of an answer, where the request is made with the intent of compiling the result of the answers obtained, either for the personal use of the person making the request, or for the purpose of reporting the same to any other person, persons, political party, unincorporated association or corporation, or for the purpose of publishing the same orally, by radio, or in written or printed form.

Historical and Revision Notes

Based on section 344 of title 50, U.S.C., 1940 ed., War and National Defense (Sept. 16, 1942, ch. 561, title III, § 314, as added Apr. 1, 1944, ch. 150, 58 Stat. 146).

Changes in phraseology were made.

§ 597. Expenditures to influence voting

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on sections 250, 252, of title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, ch. 368, title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of sections 250 and 252 of title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

The punishment provisions of section 252 of title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

§ 598. Coercion by means of relief appropriations

Whoever uses any part of any appropriation made by Congress for work relief, relief, or for increasing employment by providing loans and grants for public-works projects, or exercises or administers any authority conferred by any Appropriation Act for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 61f, 61g (Aug. 2, 1939, 11:50 a.m., E.S.T., ch. 410, §§ 7, 8, 53 Stat. 1148).

This section consolidates sections 61f and 61g of title 18, U.S.C., 1940 ed., with changes of phraseology necessary to effect consolidation.

The punishment provision was derived from section 61g of title 18, U.S.C., 1940 ed., which, by reference, was made applicable to this section.

§ 599. Promise of appointment by candidate

Whoever, being a candidate, directly or indirectly promises or pledges the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on sections 249, 252, of title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, ch. 368, title III, §§ 310, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of sections 249 and 252 of title 2, U.S.C., 1940 ed., The Congress, with changes in arrangement and phraseology necessary to effect consolidation.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

§ 600. Promise of employment or other benefit for political activity

Whoever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined not more than $10,000 or imprisoned not more than one year, or both.

(As amended Feb. 7, 1972, Pub.L. 92–225, Title II, § 202, 86 Stat. 9; Oct. 2, 1976, Pub.L. 94–453, § 3, 90 Stat. 1517.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 61b, 61g (Aug. 2, 1939, 11:50 a.m., E.S.T., ch. 410, §§ 3, 8, 53 Stat. 1147, 1148).

This section consolidates sections 61b and 61g of title 18, U.S.C., 1940 ed.

Minor changes were made in phraseology.

§ 601. Deprivation of employment or other benefit for political contribution

(a) Whoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of—

(1) any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work; or

(2) any payment or benefit of a program of the United States, a State, or a political subdivision of a State;

if such employment, position, work, compensation, payment, or benefit is provided for or made possible in whole or in part by an Act of Congress, shall be fined not more than $10,000, or imprisoned not more than one year, or both.

(b) As used in this section—

(1) the term "candidate" means an individual who seeks nomination for election, or election, to Federal, State, or local office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, to Federal, State, or local office, if he has (A) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, or (B) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office;

(2) the term "election" means (A) a general, special primary, or runoff election, (B) a convention or caucus of a political party held to nominate a candidate, (C) a primary election held for the selection of delegates to a nominating convention of a political party, (D) a primary election held for the expression of a preference for the nomination of persons for election to the office of President, and (E) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or of any State; and

(3) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(As amended Oct. 2, 1976, Pub.L. 94–453, § 1, 90 Stat. 1516.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 61c, 61g (Aug. 2, 1939, 11:50 a.m., E.S.T., ch. 410, §§ 4, 8, 53 Stat. 1147, 1148).

This section consolidates sections 61c and 61g of title 18, U.S.C., 1940 ed.

The words "except as required by law" were used as sufficient to cover the reference to the exception made to the provisions of subsection (b), section 61h of title 18, U.S.C., 1940 ed., which expressly prescribes the circumstances under which a person may be lawfully deprived of his employment and compensation therefor.

Changes were made in phraseology.

§ 602. Solicitation of political contributions

It shall be unlawful for—

(1) a candidate for the Congress;

(2) an individual elected to or serving in the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(3) an officer or employee of the United States or any department or agency thereof; or

(4) a person receiving any salary or compensation for services from money derived from the Treasury of the United States to knowingly solicit, any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(As amended Jan. 8, 1980, Pub.L. 96–187, Title II, § 201(a)(3), 93 Stat. 1367.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 208, 212 (Mar. 4, 1909, ch. 321, §§ 118, 122, 35 Stat. 1110; Feb. 28, 1925, ch. 368, § 312, 43 Stat. 1073).

This section consolidates sections 208 and 212 of title 18, U.S.C., 1940 ed.

This section, like section 201 of this title, was expanded to embrace all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations by inserting words "or any department or agency thereof." (See definitive section 6 of this title.)

The punishment provision was taken from section 212 of title 18, U.S.C., 1940 ed., which, by reference, made the punishment applicable to the crime described in this section.

Changes were made in phraseology.

References in Text. Section 301(8) of the Federal Election Campaign Act of 1971, referred to in cl. (4), is classified to section 431(8) of Title 2, U.S.C.A., The Congress.

§ 603. Making political contributions

(a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(b) For purposes of this section, a contribution to an authorized committee as defined in section 302(e)(1) of the Federal Election Campaign Act of 1971 shall be considered a contribution to the individual who has authorized such committee.

(As amended Oct. 31, 1951, c. 655, § 20(b), 65 Stat. 718; Jan. 8, 1980, Pub.L. 96–187, Title II, § 201(a)(4), 93 Stat. 1367.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 209, 212 (Mar. 4, 1909, ch. 321, §§ 119, 122, 35 Stat. 1110).

This section consolidates sections 209 and 212 of title 18, U.S.C., 1940 ed., without change of substance.

To eliminate ambiguity resulting from use of identical words in reference "officer or employee of the United States mentioned in section 208 of this title" as those appearing in section 208 of title 18, U.S.C., 1940 ed., now section 602 of this title, words "person mentioned in section 602 of this title" were inserted.

Words "from any such person" were inserted after "purpose", so as to make it clear that the section does not embrace State employees in its provisions. Some Federal agencies are located in State buildings occupied by State employees.

The punishment provision was derived from section 212 of title 18, U.S.C., 1940 ed. (See reviser's note under section 602 of this title.)

Minor changes were made in phraseology.

References in Text. Sections 301(8) and 302(e)(1) of the Federal Election Campaign Act of 1971, referred to in text, are classified to sections 431(8) and 432(e)(1), respectively, of Title 2, U.S.C.A., The Congress.

§ 604. Solicitation from persons on relief

Whoever solicits or receives or is in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose from any person known by him to be entitled to, or receiving compensation, employment, or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 61d, 61g (Aug. 2, 1939, 11:50 a.m., E.S.T., ch. 410, §§ 5, 8, 53 Stat. 1148).

This section consolidates sections 61d and 61g of title 18, U.S.C., 1940 ed.

Minor changes were made in phraseology.

§ 605. Disclosure of names of persons on relief

Whoever, for political purposes, furnishes or discloses any list or names of persons receiving compensation, employment or benefits provided for or made possible by any Act of Congress appropriating, or authorizing the appropriation of funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager; and

Whoever receives any such list or names for political purposes—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 61e, 61g (Aug. 2, 1939, 11:50 a.m., E.S.T., ch. 410, §§ 6, 8, 53 Stat. 1148).

This section consolidates sections 61e and 61g of title 18, U.S.C., 1940 ed.

Reference to persons aiding or assisting, contained in words "or to aid or assist in furnishing or disclosing" was omitted as unnecessary as such persons are made principals by section 2 of this title.

Changes were made in phraseology.

§ 606. Intimidation to secure political contributions

Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges, or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 210, 212 (Mar. 4, 1909, ch. 321, §§ 120, 122, 35 Stat. 1110).

This section consolidates sections 210 and 212 of title 18, U.S.C., 1940 ed.

Changes were made in phraseology.

§ 607. Place of solicitation

(a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined not more that $5,000 or imprisoned not more that three years, or both.

(b) The prohibition in subsection (a) shall not apply to the receipt of contributions by persons on the staff of a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, provided, that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any room, building, or other facility referred to in subsection (a), and provided that such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(e) of the Federal Election Campaign Act of 1971.

(As amended Jan. 8, 1980, Pub.L. 96–187, Title II, § 201(a)(5), 93 Stat. 1367.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 211, 212 (Mar. 4, 1909, ch. 321, §§ 121, 122, 35 Stat. 1110).

This section consolidates sections 211 and 212 of title 18, U.S.C., 1940 ed.

This section was expanded to embrace all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations by inserting words "or any department or agency thereof." (See definitive section 6, and reviser's note under section 201 of this title.)

Changes were made in phraseology.

References in Text. Sections 301(8) and 302(e) of the Federal Election Campaign Act of 1971, referred to in text, are classified to sections 431(8) and 432(e), respectively, of the Title 2, U.S.C.A., The Congress.

[§ 608. Repealed. Pub.L. 94–283, Title II, § 201(a), May 11, 1976, 90 Stat. 496]

Savings Provisions. Repeal of this section not to release or extinguish any penalty, forfeiture, or liability incurred under this section.

[§ 609. Repealed. Pub.L. 92–225, Title II, § 204, Feb. 7, 1972, 86 Stat. 10]

[§§ 610 to 617. Repealed. Pub.L. 94–283, Title II, § 201(a), May 11, 1976, 90 Stat. 496]

Savings Provisions. Repeal of these sections not to release or extinguish any penalty, forfeiture, or liability incurred under such sections.

CHAPTER 31—EMBEZZLEMENT AND THEFT

Sec.
641. Public money, property or records.
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665. Theft or embezzlement from employment and training funds; improper inducement; obstruction of investigations.
666. Theft or bribery concerning programs receiving Federal funds.
667. Theft of livestock.

[1] So in original. Catchline reads "carrier".

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 82, 87, 100, 101 (Mar. 4, 1909, ch. 321, §§ 35, 36, 47, 48, 35 Stat. 1095, 1096–1098; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197; Nov. 22, 1943, ch. 302, 57 Stat. 591.)

Section consolidates sections 82, 87, 100, and 101 of title 18, U.S.C., 1940 ed. Changes necessary to effect the consolidation were made. Words "or shall willfully injure or commit any depredation against" were taken from said section 82 so as to confine it to embezzlement or theft.

The quoted language, rephrased in the present tense, appears in section 1361 of this title.

Words "in a jail" which followed "imprisonment" and preceded "for not more than one year" in said section 82, were omitted . (See reviser's note under section 1 of this title.)

Language relating to receiving stolen property is from said section 101.

Words "or aid in concealing" were omitted as unnecessary in view of definitive section 2 of this title. Procedural language at end of said section 101 "and such person may be tried either before or after the conviction of the principal offender" was transferred to and rephrased in section 3435 of this title.

Words "or any corporation in which the United States of America is a stockholder" in said section 82 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

The provisions for fine of not more than $1,000 or imprisonment of not more than 1 year for an offense involving $100 or less and for fine of not more than $10,000 or imprisonment of not more than 10 years, or both, for an offense involving a greater amount were written into this section as more in conformity with the later congressional policy expressed in sections 82 and 87 of title 18, U.S.C., 1940 ed., than the nongraduated penalties of sections 100 and 101 of said title 18.

Since the purchasing power of the dollar is less than it was when $50 was the figure which determined whether larceny was petit larceny or grand larceny, the sum $100 was substituted as more consistent with modern values.

The meaning of "value" in the last paragraph of the revised section is written to conform with that provided in section 2311 of this title by inserting the words "face, par, or".

This section incorporates the recommendation of Paul W. Hyatt, president, board of commissioners of the Idaho State Bar Association, that sections 82 and 100 of title 18, U.S.C., 1940 ed., be combined and simplified.

Also, with respect to section 101 of title 18, U.S.C., 1940 ed., this section meets the suggestion of P.F. Herrick, United States attorney for Puerto Rico, that the punishment provision of said section be amended to make the offense a misdemeanor where the amount involved is $50 or less.

Changes were made in phraseology.

Short Title of 1984 Amendment. Section 1110 of Pub.L. 98–473, Title II, c. XI, pt. I, Oct. 12, 1984, 98 Stat. 2148, provided: "This Part [Part I of chapter XI of Title II of Pub.L. 98–473] may be cited as the 'Livestock Fraud Protection Act'."

§ 642. Tools and materials for counterfeiting purposes

Whoever, without authority from the United States, secretes within, or embezzles, or takes and carries away from any building, room, office, apartment, vault, safe, or other place where the same is kept, used, employed, placed, lodged, or deposited by authority of the United States, any tool, implement, or thing used or fitted to be used in stamping or printing, or in making some other tool or implement used or fitted to be used in stamping or printing any kind or description of bond, bill, note, certificate, coupon, postage stamp, revenue stamp, fractional currency note, or other paper, instrument, obligation, device, or document, authorized by law to be printed, stamped, sealed, prepared, issued, uttered, or put in circulation on behalf of the United States; or

Whoever, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material prepared and intended to be used in the making of any such papers, instruments, obligations, devices, or documents; or

Whoever, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material printed or stamped, in whole or part, and intended to be prepared, issued, or put in circulation on behalf of the United States as one of such papers, instruments, or obligations, or printed or stamped, in whole or part, in the similitude of any such paper, instrument, or obligation, whether intended to issue or put the same in circulation or not—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 269 (Mar. 4, 1909, ch. 321, § 155, 35 Stat. 1117).

Words "bed piece, bed-plate, roll, plate, die, seal, type, or other" were omitted as covered by "tool, implement, or thing."

Minor changes in phraseology were made.

§ 643. Accounting generally for public money

Whoever, being an officer, employee or agent of the United States or of any department or agency thereof, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law is guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 176 (Mar. 4, 1909, ch. 321, § 90, 35 Stat. 1105).

Word "employee" was inserted to avoid ambiguity as to scope of section.

Words "or of any department or agency thereof" were added after the words "United States". (See definitions of the terms "department" and "agency" in section 6 of this title.)

Mandatory punishment provisions phrased in alternative.

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

§ 644. Banker receiving unauthorized deposit of public money

Whoever, not being an authorized depositary of public moneys, knowingly receives from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law is guilty of embezzlement and shall be fined not more than the amount so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 182 (Mar. 4, 1909, ch. 321, § 96, 35 Stat. 1106).

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

Changes were made in phraseology.

§ 645. Court officers generally

Whoever, being a United States marshal, clerk, receiver, referee, trustee, or other officer of a

United States court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement and shall, where the offense is not otherwise punishable by enactment of Congress, be fined not more than double the value of the money so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

It shall not be a defense that the accused person had any interest in such moneys or fund.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 186 (May 29, 1920, ch. 212, 41 Stat. 630).

The smaller punishment for an offense involving $100 or less was inserted to conform to section 641 of this title which represents a later expression of congressional intent.

Minor changes were made in phraseology.

§ 646. Court officers depositing registry moneys

Whoever, being a clerk or other officer of a court of the United States, fails to deposit promptly any money belonging in the registry of the court, or paid into court or received by the officers thereof, with the Treasurer or a designated depositary of the United States, in the name and to the credit of such court, or retains or converts to his own use or to the use of another any such money, is guilty of embezzlement and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 185 (Mar. 4, 1909, ch. 321, § 99, 35 Stat. 1106; May 29, 1920, ch. 214, § 1, 41 Stat. 654).

The smaller punishment for an offense involving $100 or less was inserted for the reasons outlined in reviser's notes to sections 641 and 645 of this title.

Minor changes were made in phraseology.

§ 647. Receiving loan from court officer

Whoever knowingly receives, from a clerk or other officer of a court of the United States, as a deposit, loan, or otherwise, any money belonging in the registry of such court, is guilty of embezzlement, and shall be fined not more than the amount embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 187 (Mar. 4, 1909, ch. 321, § 100, 35 Stat. 1107).

The punishment provision of section 185 of title 18, U.S.C., 1940 ed., now section 646 of this title, was substituted for the words "punished as prescribed in section 185 of this title" and the smaller punishment for an offense involving $100 or less was inserted. (See reviser's notes under sections 641 and 645 of this title.)

§ 648. Custodians, generally, misusing public funds

Whoever, being an officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, loans, uses, or converts to his own use, or deposits in any bank or exchanges for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, is guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 175 (Mar. 4, 1909, ch. 321, § 89, 35 Stat. 1105).

Mandatory punishment provision was rephrased in the alternative.

The smaller punishment for an offense involving $100 or less was inserted. (See reviser's notes under sections 641 and 645 of this title.)

Minor changes in phraseology were made.

§ 649. Custodians failing to deposit moneys; persons affected

(a) Whoever, having money of the United States in his possession or under his control, fails to deposit it with the Treasurer or some public depositary of the United States, when required so to do by the Secretary of the Treasury or the head of any other proper department or agency or by the General Accounting Office, is guilty of embezzlement, and shall be fined in a sum equal to the

amount of money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) This section and sections 643, 648, 650 and 653 of this title shall apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be charged as receivers or depositaries of the same.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 177, 178 (Mar. 4, 1909, ch. 321, §§ 91, 92, 35 Stat. 1105; May 29, 1920, ch. 214, § 1, 41 Stat. 654; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Sections were consolidated.

Words "or agency" were inserted after "department." See definition of "agency" in section 6 of this title.

Mandatory punishment provisions made in alternative.

The smaller punishment for an offense involving $100 or less was inserted. (See reviser's notes under sections 641, 645 of this title.)

Minor changes were made in phraseology.

§ 650. Depositaries failing to safeguard deposits

If the Treasurer of the United States or any public depositary fails to keep safely all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other person having money of the United States, he is guilty of embezzlement, and shall be fined in a sum equal to the amount of money so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 174, (Mar. 4, 1909, ch. 321, § 88, 35 Stat. 1105; May 29, 1920, ch. 214, § 1, 41 Stat. 654.)

Mandatory punishment provisions stated in alternative.

The smaller punishment for offenses involving $100 or less was added. (See reviser's note under sections 641, 645 of this title.)

Minor changes were made in phraseology.

§ 651. Disbursing officer falsely certifying full payment

Whoever, being an officer charged with the disbursement of the public moneys, accepts, receives, or transmits to the General Accounting Office to be allowed in his favor any receipt or voucher from a creditor of the United States without having paid the full amount specified therein to such creditor in such funds as the officer received for disbursement, or in such funds as he may be authorized by law to take in exchange, shall be fined in double the amount so withheld or imprisoned not more than two years, or both; but if the amount withheld does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 181 (Mar. 4, 1909, ch. 321, § 95, 35 Stat. 1106; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

The penalty provided by section 652 of this title, a similar section, was incorporated in this section.

(For explanation of the smaller penalty for an offense involving $100 or less, see reviser's notes under sections 641 and 645 of this title.)

Minor changes were made in phraseology.

§ 652. Disbursing officer paying lesser in lieu of lawful amount

Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress, pays to any clerk or other employee of the United States, or of any department or agency thereof, a sum less than that provided by law, and requires such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement, and shall be fined in double the amount so withheld or imprisoned not more than two years, or both; but if the amount embezzled is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C, 1940 ed., § 172 (Mar. 4, 1909, ch. 321, § 86, 35 Stat. 1105).

Words "or of any department or agency thereof," were inserted after "United States" so as to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

Mandatory punishment provision made in alternative.

The smaller punishment for an offense involving $100 or less was added. (See reviser's note under sections 641, 645 of this title.)

Minor changes were made in phraseology.

§ 653. Disbursing officer misusing public funds

Whoever, being a disbursing officer of the United States, or any department or agency thereof, or a person acting as such, in any manner converts to his own use, or loans with or without interest, or deposits in any place or in any manner, except as authorized by law, any public money intrusted to

him; or, for any purpose not prescribed by law, withdraws from the Treasury or any authorized depositary, or transfers, or applies, any portion of the public money intrusted to him, is guilty of embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled or imprisoned not more than ten years, or both; but if the amount embezzled is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 173 (Mar. 4, 1909, ch. 321, § 87, 35 Stat. 1105; May 29, 1920, ch. 214, § 1, 41 Stat. 654).

Words "or any department or agency thereof," were inserted after "United States" so as to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

The smaller punishment for an offense involving $100 or less was added. (See reviser's note under sections 641, 645 of this title.)

Minor changes were made in phraseology.

§ 654. Officer or employee of United States converting property of another

Whoever, being an officer or employee of the United States or of any department or agency thereof, embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee, shall be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both; but if the sum embezzled is $100 or less, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 183 (Mar. 4, 1909, ch. 321, § 97, 35 Stat. 1106).

The phrase "Whoever being an officer or agent of the United States or of any department or agency thereof," was substituted for the words "Any officer connected with, or employed in the Internal Revenue Service of the United States * * * And any officer of the United States, or any assistant of such officer," in order to clarify scope of section. (See definitive section 6 and reviser's note thereunder.)

The embezzlement of Government money or property is adequately covered by section 641 of this title.

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

Minor changes were made in phraseology.

§ 655. Theft by bank examiner

Whoever, being a bank examiner or assistant examiner, steals, or unlawfully takes, or unlawfully conceals any money, note, draft, bond, or security or any other property of value in the possession of any bank or banking institution which is a member of the Federal Reserve System or which is insured by the Federal Deposit Insurance Corporation, or from any safe deposit box in or adjacent to the premises of such bank, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount taken or concealed does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both; and shall be disqualified from holding office as a national bank examiner or Federal Deposit Insurance Corporation examiner.

This section shall apply to all public examiners and assistant examiners who examine member banks of the Federal Reserve System or banks the deposits of which are insured by the Federal Deposit Insurance Corporation, whether appointed by the Comptroller of the Currency, by the Board of Governors of the Federal Reserve System, by a Federal Reserve Agent, by a Federal Reserve bank, or by the Federal Deposit Insurance Corporation, or appointed or elected under the laws of any State; but shall not apply to private examiners or assistant examiners employed only by a clearing-house association or by the directors of a bank.

HISTORICAL AND REVISION NOTES

Based on section 593 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22, 38 Stat. 272; Sept. 26, 1918, ch. 177, § 5, 40 Stat. 970; Feb. 25, 1927, ch. 191, § 15, 44 Stat. 1232; Aug. 23, 1935, ch. 614, § 326(a), 49 Stat. 715).

Other provisions of section 593 of title 12, U.S.C. 1940 ed., Banks and Banking, are incorporated in sections 217 and 218 of this title.

The words "and shall upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

The phrase "bank or banking institution which is a member of the Federal Reserve System or which is insured by the Federal Deposit Insurance Corporation" was substituted for "member bank or insured bank" to avoid the use of a definitive section based on sections 221a, 264(e)(8), and 588a of title 12, U.S.C., 1940 ed., Banks and Banking. Words "banks the deposits of which are insured by the Federal Deposit Insurance Corporation" were substituted for "insured banks" in second paragraph, for the same reason.

Punishment provision harmonized with that of section 656 of this title. (See also, reviser's notes under sections 641 and 645 of this title.)

Changes in phraseology were also made.

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Historical and Revision Notes

Based on sections 592, 597 of title 12, U.S.C., 1940 ed., Banks and Banking (R.S. 5209; Dec. 23, 1913, ch. 6, § 22(i), as added June 19, 1934, ch. 653, § 3, 48 Stat. 1107; Sept. 26, 1918, ch. 177, § 7, 40 Stat. 972; Aug. 23, 1935, ch. 614, § 316, 49 Stat. 712).

Section 592 of title 12, U.S.C., 1940 ed., Banks and Banking, was separated into three sections the first of which, embracing provisions relating to embezzlement, abstracting, purloining, or willfully misapplying moneys, funds, or credits, constitutes part of the basis for this section. Of the other two sections, one section, 334 of this title, relates only to the issuance and circulation of Federal Reserve notes and the other section 1005 of this title, to false entries or the wrongful issue of bank obligations.

The original section, containing more than 500 words, was verbose, diffuse, redundant, and complicated. The enumeration of banks affected is repeated eight times. The revised section without changing in any way the meaning or substance of existing law, clarifies, condenses, and combines related provisions largely rewritten in matters of style.

The words "national bank" were substituted for "national banking association," the terms being synonymous by definition of section 221 of title 12, U.S.C., 1940 ed., Banks and Banking, written into the last paragraph of this section. This change made possible the use of the term "such bank" in substitution for the words "such Federal Reserve bank, member bank, or such national banking association, or insured bank," in each of seven instances.

The special and separate provisions of the original section relating to embezzlement by national bank receivers or Federal Reserve agents are readily combined in the revised section by including these officers in the initial enumeration of persons at whom the act is directed and by inserting the word "purloins" after "embezzles, abstracts," and the phrase "or any moneys, funds, assets, or securities intrusted to the custody or care," following the words "of such bank".

The last paragraph of the revised section includes the definitions of sections 221 and 264(c) of title 12, U.S.C., 1940 ed., Banks and Banking, made applicable by express provision of the original section. These were written in, with only such changes of phraseology as were necessary, in order to make the revised section complete and self-contained. For meaning of "bank," as used in bank robbery statute, see section 2113 of this title.

Section 597 of title 12, U.S.C., 1940 ed., Banks and Banking, likewise was separated into two parts, one of which was combined with the embezzlement provisions of said section 592 to form this section. The other part was combined with the related provisions of said section 592 to form section 1005 of this title.

It will be noted that section 597 of title 12, U.S.C., 1940 ed., Banks and Banking, was limited to "Whoever, being connected in any capacity with a Federal Reserve bank"; that it enumerated "note, debenture, bond, or other obligation, or draft, mortgage, judgment, or decree"; and that it stipulated punishment by fine of not more than $10,000 or imprisonment of not more than 5 years, or both.

In combining these provisions, the words "or connected in any capacity" were written into the new section after the words "employee of," thus making them applicable not only to Federal Reserve banks but to the other banks as well. The phrase of section 592 of title 12, U.S.C., 1940 ed., Banks and Banking, "or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree," was modified to include the enumeration of like obligations in section 597 of title 12, U.S.C., 1940 ed., Banks and Banking, and to read as follows; "whoever without such authority makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation or mortgage, judgment, or decree". (See section 1005 of this title.)

As thus changed the new section is clear, simple, and unambiguous. The very slight changes of substance that have been noted, were unavoidable if the two sections were to be combined. Without combination any constructive revision of these duplicitous and redundant provisions was impossible. It is believed that the revised sections adequately and correctly represent the intent of Congress as the same can be gathered from the overlapping and confusing enactments. At any rate, the severest criticism of the revised sections is that a person connected with a

Federal Reserve bank who violates these sections can at most be punished by a fine of $5,000 or imprisonment of 5 years, or both, whereas under section 597 of title 12, U.S.C., 1940 ed., Banks and Banking, he might have been fined $10,000 or imprisoned 5 years, or both. Obviously an embezzler will rarely be financially able to pay even a $5,000 fine even where such fine is imposed. Certainly if it is an adequate fine for a national bank president it is not too disproportionate for a person "connected in any capacity with a Federal Reserve bank".

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641, 645 of this title.)

The words "shall be deemed guilty of a misdemeanor" were omitted as unnecessary in view of definitive section 1 of this title.

The words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed without conviction.

Words "In any district court of the United States" were omitted as unnecessary since section 3231 of this title gives the district courts jurisdiction of criminal prosecution.

§ 657. Lending, credit and insurance institutions

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administrator of the National Credit Union Administration or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended May 24, 1949, ch. 139, § 11, 63 Stat. 90; July 28, 1956, c. 773, § 1, 70 Stat. 714; Aug. 21, 1958, Pub.L. 85–699, Title VII, § 703, 72 Stat. 698; Oct. 4, 1961, Pub.L. 87–353, § 3(q), 75 Stat. 774; May 25, 1967, Pub.L. 90–19, § 24(a), 81 Stat. 27; Oct. 19, 1970, Pub.L. 91–468, § 4, 84 Stat. 1016.)

Historical and Revision Notes

1948 Act

Based on sections 1026(b) and 1514(c) of title 7, U.S.C., 1940 ed., Agriculture, and sections 264(u), 984, 1121, 1138d(c), 1311, 1441(c), 1467(c), and 1731(c) of title 12, U.S.C., 1940 ed., Banks and Banking, and section 616(c) of title 15, U.S.C., 1940 ed., Commerce and Trade (Dec. 23, 1913, ch. 6, § 12B(u), as added June 16, 1933, ch. 89, § 8, 48 Stat. 178; July 17, 1916, ch. 245, § 31, fourth paragraph, 39 Stat. 382; July 17, 1916, ch. 245, § 211(a), as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1459; Mar. 4, 1923, ch. 252, title II, § 216(a), 42 Stat. 1471; Jan. 22, 1932, ch. 8, § 16(c), 47 Stat. 11; July 22, 1932, ch. 522, § 21(c), 47 Stat. 738; Mar. 27, 1933, Ex. Ord. No. 6084; June 13, 1933, ch. 64, § 8(c), 48 Stat. 135; June 16, 1933, ch. 98, § 64(c), 48 Stat. 268; Jan. 31, 1934, ch. 7, § 13, 48 Stat. 347; June 27, 1934, ch. 847, § 512(c), 48 Stat. 1265; Aug. 23, 1935, ch. 614, § 101, 49 Stat. 701; July 22, 1937, ch. 517, title IV, § 52(b), 50 Stat. 532; Feb. 16, 1938, ch. 30, title V, § 514(c), 52 Stat. 76; Aug. 14, 1946, ch. 964, § 3, 60 Stat. 1064).

Each of the eleven sections from which this section was derived contained similar provisions relating to embezzlement, false entries, and fraudulent issuance or assignment of obligations with respect to one or more named agencies or corporations.

These were separated and the embezzlement and misapplication provisions of all form the basis of this section, and with one exception the remaining provisions of each section forming the basis for section 1006 of this title. The sole exception was that portion of said section 616(c) of title 15 as to the disclosure of information which now forms section 1904 of this title.

The revised section condenses and simplifies the constituent provisions without change of substance except as in this note indicated.

The punishment in each section was the same except that in section 1026(b) of title 7, U.S.C., 1940 ed., Agriculture, and sections 984, 1121, and 1311 of title 12, U.S.C., 1940 ed., Banks and Banking, the maximum fine was $5,000. The revised section adopts the $5,000 maximum. (For same penalty covering similar offense, see section 656 of this title.)

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes to sections 641–645 of this title.)

The enumeration of "moneys, funds, credits, securities, or other things of value" does not occur in any one of the original sections but is an adequate, composite enumeration of the instruments mentioned in each.

References to persons aiding and abetting contained in sections 984, 1121, 1311 of title 12, U.S.C., 1940 ed., Banks and Banking, were omitted as unnecessary, such persons being made principals by section 2 of this title.

The term "receiver" is used in sections 1121 and 1311 of title 12, U.S.C., 1940 ed., Banks and Banking, with reference to Federal intermediate banks and agricultural credit corporations, and is undoubtedly embraced in the

term "connected in any capacity with," but the phrase "and whoever, being a receiver of any such institution" was inserted in this section to obviate all doubt as to its comprehensive scope.

The suggestion has been made that "private examiners" should be included. These undoubtedly are covered by the words "connected in any capacity with." (See also section 655 of this title.)

The term "or any department or agency of the United States" was inserted in each revised section in order to clarify the sweeping provisions against fraudulent acts and to obviate any possibility of ambiguity by reason of the omission of specific agencies named in the constituent sections. (See section 6 of this title defining "department and agency." For other verbal changes and deletions see reviser's note under section 656 of this title.)

Abolition of Home Owners' Loan Corporation, Farmers' Home Corporation, and Reconstruction Finance Corporation. The Home Owners' Loan Corporation, the Farmers' Home Corporation, and the Reconstruction Finance Corporation were dissolved and abolished.

§ 658. Property mortgaged or pledged to farm credit agencies

Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, the Farm Credit Administration, any Federal intermediate credit bank, or the Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any production credit association organized under sections 1131–1134m of Title 12, any regional agricultural credit corporation, or any bank for cooperatives, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended May 24, 1949, c. 139, § 12, 63 Stat. 91; Oct. 31, 1951, c. 655, § 21, 65 Stat. 718; July 26, 1956, c. 741, Title I, § 109, 70 Stat. 667; Oct. 4, 1961, Pub.L. 87–353, § 3(r), 75 Stat. 774.)

Historical and Revision Notes

1948 Act

Based on sections 1026(c) and 1514(d) of title 7, U.S.C., 1940 ed., Agriculture, and section 1138d(d) of title 12, U.S.C., 1940 ed., Banks and Banking (June 16, 1933, ch. 98, § 64, 48 Stat. 269; Jan. 31, 1934, ch. 7, § 13, 48 Stat. 347; July 22, 1937, ch. 517, title IV, § 52(c), 50 Stat. 532; Feb. 16, 1938, ch. 30, title V, § 514(d), 52 Stat. 76; Aug. 14, 1946, ch. 964, § 3, 60 Stat. 1064).

To avoid reference to another section the words "the Farm Credit Administration, any Federal intermediate credit bank, the Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, or any production credit corporation or corporation in which a production credit corporation holds stock, any regional agricultural credit corporation, or any bank for cooperatives" were substituted for the words "or any corporation referred to in subsection (a) of this section."

The punishment provision was completely rewritten. The $2,000 fine of section 1026(c) of title 7, U.S.C., 1940 ed., and the 2-year penalty of that section, section 1514(d) of title 7, U.S.C., 1940 ed., and section 1138(d) of title 12, U.S.C., 1940 ed., were incongruous in juxtaposition with other sections of this chapter and were therefore increased to $5,000 and 5 years. (See sections 656 and 657 of this title.)

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

Minor changes were made in phraseology.

1949 Act

[Section 12] conforms section 658 of title 18 U.S.C., to administrative practice which in turn was modified to comply with congressional policy. (See note to sec. 11 [of 1949 Act, set out in Legislative History note under section 657 of title 18]).

References in Text. Sections 1131 to 1134m of Title 12, referred to in text, were either repealed or omitted from the Code.

Abolition of Farmers' Home Corporation. The Farmers' Home Corporation was abolished.

§ 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from

any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

(As amended May 24, 1949, c. 139, § 13, 63 Stat. 91; Oct. 14, 1966, Pub.L. 89-654, § 1(a)-(d), 80 Stat. 904.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 409, 410, 411 (Feb. 13, 1913, ch. 50, §§ 1, 2, 37 Stat. 670; Feb. 13, 1913, ch. 50, § 3, as added Jan. 28, 1925, ch. 102, 43 Stat. 794; Jan. 28, 1925, ch. 102, 43 Stat. 793, 794; Jan. 21, 1933, ch. 16, 47 Stat. 773, 774; July 24, 1946, ch. 606, 60 Stat. 656.)

This section consolidates sections 409, 410, and 411 of title 18, U.S.C., 1940 ed. First clause of said section 409 was incorporated in section 2117 of this title.

In the paragraph immediately preceding the last paragraph the words "and to which" were added to obviate an inadvertent and incongruous omission in the enactment of act July 24, 1946, ch. 606, § 3, 60 Stat. 657. This is in harmony with corrective legislation pending before the Eightieth Congress.

The definitions of "station house", "depot", "wagon", "automobile", "truck", or "other vehicle", contained in said section 409 of title 18, are omitted as unnecessary.

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.) This improvement was suggested by United States Attorney P.F. Herrick, of Puerto Rico. (See reviser's note under section 641 of this title.)

Minor changes were made in phraseology.

1949 ACT

This section [section 13] inserts the word, "embezzled" preceding "or stolen" near the ends of the second and fourth paragraphs of section 659 of title 18, U.S.C., to restore the language of the original law from which such section was derived. Also, for clarity, substitutes, "whoever" for "who" preceding "buys" in said fourth paragraph of section 659.

§ 660. Carrier's funds derived from commerce; state prosecutions

Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred but also in any district in which the defendant may have taken or had possession of such moneys, funds, credits, securities, property or assets.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 409, 412 (Feb. 13, 1913, ch. 50, § 1, 37 Stat. 670; Oct. 15, 1914, ch. 323, § 9, 38 Stat. 733; Jan. 28, 1925, ch. 102, 43 Stat. 793; Jan. 21, 1933, ch. 16, 47 Stat. 773; July 24, 1946, ch. 606, 60 Stat. 656).

Section consolidates a portion of section 409 with section 412, both of title 18, U.S.C., 1940 ed. Other provisions of said section 409 are incorporated in sections 659 and 2117 of this title.

Definitive language in section 412 of title 18, U.S.C., 1940 ed., as to offense being a felony was deleted to conform with section 1 of this title. (See reviser's note under section 550 of this title.)

Words [sic] "imprisoned" was substituted for "confined in the penitentiary" in section 412 of title 18, U.S.C., 1940 ed., in view of power of Attorney General under section 4082 of this title.

Minimum punishment provision "less than one year nor" in section 412 of title 18, U.S.C., 1940 ed., was omitted for reasons in reviser's note under section 203 of this title.

Maximum fine of $5,000 was substituted for minimum fine of $500 in section 412 of title 18, U.S.C., 1940 ed., as being more consonant with the scheme of penalties and offenses provided by Congress for most sections in this chapter.

Sentence in section 412 of title 18, U.S.C., 1940 ed., "Nothing in this section shall be held to take away or impair the jurisdiction of the several courts under the laws thereof;", was omitted in view of section 3231 of this title.

Changes were made in phraseology.

§ 661. Within special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin, any personal property of another shall be punished as follows:

If the property taken is of a value exceeding $100, or is taken from the person of another, by a fine of not more than $5,000, or imprisonment for not more than five years, or both; in all other cases, by a fine of not more than $1,000 or by imprisonment not more than one year, or both.

If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, shall be the value of the property stolen.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 466 (Mar. 4, 1909, ch. 321, § 287, 35 Stat. 1144).

Words "within the special maritime and territorial jurisdiction of the United States" were inserted to conform with section 7 of this title. (See reviser's note under that section.)

The maximum fine and imprisonment provisions were modified and "five years" and "$5,000" substituted for "ten years" and "$10,000" and the sum of $100 was substituted for $50 as more in accord with other sections of this chapter. (See section 641 of this title.)

Minor changes were made in phraseology.

§ 662. Receiving stolen property within special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, buys, receives, or conceals any money, goods, bank notes, or other thing which may be the subject of larceny, which has been feloniously taken, stolen, or embezzled, from any other person, knowing the same to have been so taken, stolen, or embezzled, shall be fined not more than $1,000 or imprisoned not more than three years, or both; but if the amount or value of thing so taken, stolen or embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 467 (Mar. 4, 1909, ch. 321, § 288, 35 Stat. 1145).

Same language was inserted as in section 661 of this title for the same reason.

Mandatory punishment provision was rephrased in the alternative.

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

This accords with the recommendation of United States Attorney P.F. Herrick of Puerto Rico.

Language as to order of trial was omitted and incorporated in section 3435 of this title.

§ 663. Solicitation or use of gifts

Whoever solicits any gift of money or other property, and represents that such gift is being solicited for the use of the United States, with the intention of embezzling, stealing, or purloining such gift, or converting the same to any other use or purpose, or whoever, having come into possession of any money or property which has been donated by the owner thereof for the use of the United States, embezzles, steals or purloins such money or property, or converts the same to any other use or purpose, shall be fined not more than

$5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on section 641e of title 50, App. U.S.C., 1940 ed., War and National Defense (Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title XI, § 1106, 56 Stat. 184).

This section was taken from the Second War Powers Act of 1942, which was temporary legislation. However, the subject matter was so independent of the war effort as to warrant its inclusion in this title as a permanent provision.

Words "shall be guilty of a felony" were omitted. See Reviser's Note under section 550 of this title.

Words "and upon conviction thereof" were omitted as unnecessary since punishment cannot be imposed until a conviction is secured.

§ 664. Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

(Added Pub.L. 87–420, § 17(a), Mar. 20, 1962, 76 Stat. 41, and amended Pub.L. 93–406, Title I, § 111(a)(2)(A), Sept. 2, 1974, 88 Stat. 851.)

References in Text. Title I of the Employee Retirement Income Security Act of 1974, referred to in text, is classified generally to section 1001 et seq. of Title 29, U.S.C.A., Labor.

§ 665. Theft or embezzlement from employment and training funds; improper inducement; obstruction of investigations

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency or organization receiving financial assistance or any funds under the Comprehensive Employment and Training Act or the Job Training Partnership Act knowingly enrolls an ineligible participant, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a financial assistance agreement or contract pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than 2 years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, such person shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

(b) Whoever, by threat or procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a financial assistance agreement or contract under the Comprehensive Employment and Training Act or the Job Training Partnership Act induces any person to give up any money or thing of any value to any person (including such organization or agency receiving funds) shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(c) Any person whoever willfully obstructs or impedes or willfully endeavors to obstruct or impede, an investigation or inquiry under the Comprehensive Employment and Training Act or the Job Training Partnership Act, or the regulations thereunder, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 1 year, or by both such fine and imprisonment.

(Added Pub.L. 93–203, Title VII, § 711(a), formerly Title VI, § 611(a), Dec. 28, 1973, 87 Stat. 881, renumbered Pub.L. 93–567, Title I, § 101, Dec. 31, 1974, 88 Stat. 1845, and amended Pub.L. 95–524, § 3(a), Oct. 27, 1978, 92 Stat. 2017; Pub.L. 97–300, Title I, § 182, Oct. 13, 1982, 96 Stat. 1357.)

References in Text. The Comprehensive Employment and Training Act, referred to in text, is Pub.L. 93–203, Dec. 28, 1973, 87 Stat. 839, as amended, which was classified to section 801 et seq. of Title 29, U.S.C.A., Labor, and was repealed by Pub.L. 97–300, Title I, § 184(a)(1), Oct. 13, 1982, 96 Stat. 1357.

The Job Training Partnership Act, referred to in text, is Pub.L. 97–300, Oct. 13, 1982, 96 Stat. 1322, which, in addition to repealing the Comprehensive Employment and Training Act [see above], enacted sections 49, 49a, 49b, 49e, 49f, 49*l*, and 49*l*–1 and 1501 et seq. of Title 29, U.S.C.A., Labor, amended this section, sections 49d, 49g, 49h, 49i, and 49j of Title 29, and sections 602, 632, and 633 of Title 42, U.S.C.A., The Public Health and Welfare, and enacted provisions set out as notes under sections 49 and 801 of Title 29.

§ 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, being an agent of an organization, or of a State or local government agency, that receives benefits in excess of $10,000 in any one year period pursuant to a Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance, embezzles,steals, purloins, willfully misapplies, obtains by fraud, or otherwise knowingly without authority converts to his own use or to the use of another, property having a value of $5,000 or more owned by or under the care, custody, or

control of such organization or State or local government agency, shall be imprisoned for not more than ten years and fined not more than $100,000 or an amount equal to twice that which was obtained in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(b) Whoever, being an agent of an organization, or of a State or local government agency, described in subsection (a), solicits, demands, accepts, or agrees to accept anything of value from a person or organization other than his employer or principal for or because of the recipient's conduct in any transaction or matter or a series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned for not more than ten years or fined not more than $100,000 or an amount equal to twice that which was obtained, demanded, solicited or agreed upon in violation of this subsection, whichever is greater, or both so imprisoned and fined.

(c) Whoever offers, gives, or agrees to give to an agent of an organization or of a State or local government agency, described in subsection (a), anything of value for or because of the recipient's conduct in any transaction or matter or any series of transactions or matters involving $5,000 or more concerning the affairs of such organization or State or local government agency, shall be imprisoned not more than ten years or fined not more than $100,000 or an amount equal to twice that offered, given or agreed to be given, whichever is greater, or both so imprisoned and fined.

(d) For purposes of this section—

(1) "agent" means a person or organization authorized to act on behalf of another person, organization or a government and, in the case of an organization or a government, includes a servant or employee, a partner, director, officer, manager and representative;

(2) "organization" means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, and any other association of persons;

(3) "government agency" means a subdivision of the executive, legislative, judicial, or other branch of a government, including a department, independent establishment, commission, administration, authority, board, and bureau; or a corporation or other legal entity established by, and subject to control by, a government or governments for execution of a governmental or intergovernmental program; and

(4) "local" means of or pertaining to a political subdivision within a State.

(Added Pub.L. 98–473, Title II, § 1104(a), Oct. 12, 1984, 98 Stat. 2143.)

§ 667. Theft of livestock

Whoever obtains or uses the property of another which has a value of $10,000 or more in connection with the marketing of livestock in interstate or foreign commerce with intent to deprive the other of a right to the property or a benefit of the property or to appropriate the property to his own use or the use of another shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(Added Pub.L. 98–473, Title II, § 1111, Oct. 12, 1984, 98 Stat. 2149.)

CHAPTER 33—EMBLEMS, INSIGNIA AND NAMES

Sec.

700. Desecration of the flag of the United States; penalties.
701. Official badges, identification cards, other insignia.
702. Uniform of armed forces and Public Health Service.
703. Uniform of friendly nation.
704. Military medals or declarations.
705. Badge or medal of veterans' organizations.
706. Red Cross.
707. 4-H Club emblem fraudulently used.
708. Swiss Confederation coat of arms.
709. False advertising or misuse of names to indicate Federal agency.
710. Cremation urns for military use.
711. "Smokey Bear" character or name.
711a. "Woodsy Owl" character, name, or slogan.
712. Misuse of names, words, emblems, or insignia.
713. Use of likenesses of the great seal of the United States, and of the seals of the President and Vice President.
[714. Repealed.]
715. "The Golden Eagle Insignia".

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 700. Desecration of the flag of the United States; penalties

(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

(b) The term "flag of the United States" as used in this section, shall include any flag, standard,

colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.

(Added Pub.L. 90-381, § 1, July 5, 1968, 82 Stat. 291.)

§ 701. Official badges, identification cards, other insignia

Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 76a, 76b (June 29, 1932, ch. 306, §§ 1, 2, 47 Stat. 342; May 22, 1939, ch. 141, 53 Stat. 752).

Sections were consolidated.

The term "department or agency" was substituted for "department or independent office" in two places to embrace all properly constituted agencies as defined in section 6 of this title and to eliminate any possible ambiguity as to scope of section.

Minor changes were made in phraseology.

§ 702. Uniform of armed forces and Public Health Service

Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both.

(As amended May 24, 1949, c. 139, § 15(a), 63 Stat. 91.)

Historical and Revision Notes

1948 Act

Based on section 1393 of title 10, U.S.C., 1940 ed., Army and Air Force, and section 228 of title 42, U.S.C., 1940 ed., The Public Health and Welfare (June 3, 1916, ch. 134, § 125, 39 Stat. 216 (2d paragraph); July 1, 1944, ch. 373, § 510, 58 Stat. 711).

"Auxiliary of such" was inserted to extend protection to the uniforms of any auxiliary corps that may be established.

Fine of "$250" was substituted for "$300" as being more consonant with the penalties provided for similar offenses in this chapter.

Minor changes of phraseology also were made.

1949 Act

This section [section 15] inserts "armed forces" in the catch line and text of section 702 of title 18, U.S.C., and thereby includes the Air Force which was formerly part of the Army. (See note to sec. 5 [of 1949 Act, set out in Legislative History note under section 244 of title 18]). Also, it incorporates in such section the provisions of act of April 15, 1948 (ch. 188, 62 Stat. 172), which relates to this section as well as to section 1393 of title 10, U.S.C. (one of the sources of such sec. 701), as it existed at the time of the enactment of the revision of title 18 and which was not incorporated in title 18 when the revision was enacted. In this connection specific reference to the Canal Zone, Guam, American Samoa, and the Virgin Islands, as contained in such act of April 15, 1948, were omitted as covered by the phrase, "in any place within the jurisdiction of the United States," as used in this amendment of such section 702 of title 18, U.S.C.

Change of Name. The Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services and the Secretary, or any other official, of Health, Education, and Welfare was redesignated the Secretary or official, as appropriate, of Health and Human Services by Pub.L. 96-88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, with any reference to the Department, Secretary or other official of Health, Education, and Welfare deemed to refer to the Department, Secretary or other official of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary or Department of Education pursuant to section 301 of Pub.L. 96-88. See sections 3441 and 3508 of Title 20, U.S.C.A., Education.

§ 703. Uniform of friendly nation

Whoever, within the jurisdiction of the United States, with intent to deceive or mislead, wears any naval, military, police, or other official uniform, decoration, or regalia of any foreign state, nation, or government with which the United States is at peace, or anything so nearly resembling the same as to be calculated to deceive, shall be fined not

more than $250 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on section 246 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (July 8, 1918, ch. 138, 40 Stat. 821).

Words "upon conviction" were deleted as surplusage, since punishment cannot be imposed until a conviction is secured.

Reference to territories or places subject to jurisdiction of the United States was omitted in view of section 5 of this title defining the term "United States."

Fine of "$250" was substituted for "$300" as being more consonant with the penalties provided for similar offenses in this chapter.

Words "unless such wearing thereof be authorized by such state, nation, or government" were deleted as unnecessary and undesirable since it is unthinkable that a friendly power would authorize such deceit.

Minor changes were made in phraseology.

§ 704. Military medals or decorations

Whoever knowingly wears, manufactures, or sells any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both.

(As amended May 24, 1949, c. 139, § 16, 63 Stat. 92.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on section 1425 of title 10, U.S.C., 1940 ed., Army and Air Force (Feb. 24, 1923, ch. 110, 42 Stat. 1286; Apr. 21, 1928, ch. 392, 45 Stat. 437).

Section was made to cover the decorations and medals of the Navy Department as well as the War Department.

Minor changes were made in phraseology.

1949 ACT

This section [section 16] clarifies the wording of section 704 of title 18, U.S.C., to embrace all service decorations awarded to members of the armed forces whether by the Army, Navy, Air Force, or other branch of such forces. (See note to sec. 5 [of 1949 Act, set out in Legislative History note under section 244 of title 18]).

§ 705. Badge or medal of veterans' organizations

Whoever knowingly manufactures, reproduces, sells or purchases for resale, either separately or on or appended to, any article of merchandise manufactured or sold, any badge, medal, emblem, or other insignia or any colorable imitation thereof, of any veterans' organization incorporated by enactment of Congress, or of any organization formally recognized by any such veterans' organization as an auxiliary of such veterans' organization, or knowingly prints, lithographs, engraves or otherwise reproduces on any poster, circular, periodical, magazine, newspaper, or other publication, or circulates or distributes any such printed matter bearing a reproduction of such badge, medal, emblem, or other insignia or any colorable imitation thereof, except when authorized under rules and regulations prescribed by any such organization, shall be fined not more than $250 or imprisoned not more than six months, or both.

(As amended Aug. 4, 1950, c. 578, 64 Stat. 413.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 76e (June 25, 1940, ch. 426, 54 Stat. 571).

Words beginning the section are from the punishment provision of last sentence which was itself rewritten without surplusage.

Changes were made in phraseology.

§ 706. Red Cross

Whoever wears or displays the sign of the Red Cross or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for the American National Red Cross; or

Whoever, whether a corporation, association or person, other than the American National Red Cross and its duly authorized employees and agents and the sanitary and hospital authorities of the armed forces of the United States, uses the emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof or the words "Red Cross" or "Geneva Cross" or any combination of these words—

Shall be fined not more than $250 or imprisoned not more than six months, or both.

This section shall not make unlawful the use of any such emblem, sign, insignia or words which was lawful on the date of enactment of this title.

(As amended May 24, 1949, c. 139, § 17, 63 Stat. 92.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on section 4 of title 36, Patriotic Societies and Observances (Jan. 5, 1905, ch. 23, § 4, 33 Stat. 600; June 23, 1910, ch. 372, § 1, 36 Stat. 604).

False personation provision in first part of section was omitted here and incorporated in section 917 of this title.

Words of punishment "$250" and "six months" were substituted for "$500" and "one year" respectively as

more consonant with penalties provided for similar offenses in this chapter. (See sections 701, 704, 705 of this title.)

Punishment provisions were also changed to omit reference to "misdemeanor" in view of definitive section 1 of this title.

Words "upon conviction thereof" were omitted as surplusage, because punishment can only be imposed after conviction.

Changes were made in phraseology.

1949 Act

This section [section 17] clarifies the wording of section 706 of title 18, U.S.C., to embrace all service sanitary units whether belonging to the Army, Navy, Air Force, or other branches of the Armed services [sic]. (See note to sec. 5 [of 1949 Act, set out in Legislative History note under section 244 of title 18]).

§ 707. 4–H Club emblem fraudulently used

Whoever, with intent to defraud, wears or displays the sign or emblem of the 4–H clubs, consisting of a green four-leaf clover with stem, and the letter H in white or gold on each leaflet, or any insignia in colorable imitation thereof, for the purpose of inducing the belief that he is a member of, associated with, or an agent or representative for the 4–H clubs; or

Whoever, whether an individual, partnership, corporation or association, other than the 4–H clubs and those duly authorized by them, the representatives of the United States Department of Agriculture, the land grant colleges, and persons authorized by the Secretary of Agriculture, uses, within the United States, such emblem or any sign, insignia, or symbol in colorable imitation thereof, or the words "4–H Club" or "4–H Clubs" or any combination of these or other words or characters in colorable imitation thereof—

Shall be fined not more than $250 or imprisoned not more than six months, or both.

This section shall not make unlawful the use of any such emblem, sign, insignia or words which was lawful on the date of enactment of this title.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 76c and 76d (June 5, 1939, ch. 184, §§ 1, 2, 53 Stat. 809).

The first provision of section 76c of title 18, U.S.C., 1940 ed., relating to fraudulently pretending to be a member of a 4–H Club was incorporated in section 916 of this title.

The language describing the emblem was transposed.

Unnecessary words were omitted from punishment provision, and "$250" was substituted for "$300" to make the punishment consonant with the penalties provided for similar offenses. (See sections 701, 704, 705 of this title for similar offenses.)

The language of section 76d of title 18, U.S.C., 1940 ed., was rephrased and inserted after "whoever," in the second paragraph.

Minor changes were made in phraseology.

§ 708. Swiss Confederation coat of arms

Whoever, whether a corporation, partnership, unincorporated company, association, or person within the United States, willfully uses as a trade mark, commercial label, or portion thereof, or as an advertisement or insignia for any business or organization or for any trade or commercial purpose, the coat of arms of the Swiss Confederation, consisting of an upright white cross with equal arms and lines on a red ground, or any simulation thereof, shall be fined not more than $250 or imprisoned not more than six months, or both.

This section shall not make unlawful the use of any such design or insignia which was lawful on August 31, 1948.

(As amended Oct. 31, 1951, c. 655, § 21a, 65 Stat. 719.)

Historical and Revision Notes

Based on section 248 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 20, 1936, ch. 635, §§ 1, 2, 49 Stat. 1557).

Reference to "jurisdiction" of the United States was omitted as unnecessary in view of definition of "United States" in section 5 of this title.

Words of punishment "$250" and "six months" were substituted for "$500" and "one year" respectively, as more consonant with penalties for similar offenses in this chapter. (See sections 701, 704, 705 of this title.)

Punishment provision was also changed to omit reference to "misdemeanor" in view of definitive section 1 of this title.

Words "upon conviction" were omitted as surplusage, because punishment can only be imposed after conviction.

Minor changes were made in phraseology.

§ 709. False advertising or misuse of names to indicate Federal agency

Whoever, except as permitted by the laws of the United States, uses the words "national", "Federal", "United States", "reserve", or "Deposit Insurance" as part of the business or firm name of a person, corporation, partnership, business trust, association or other business entity engaged in the banking, loan, building and loan, brokerage, factorage, insurance, indemnity, savings or trust business; or

Whoever falsely advertises or represents, or publishes or displays any sign, symbol or advertisement reasonably calculated to convey the impression that a nonmember bank, banking association, firm or partnership is a member of the Federal reserve system; or

Whoever, except as expressly authorized by Federal law, uses the words "Federal Deposit", "Federal Deposit Insurance", or "Federal Deposit Insurance Corporation" or a combination of any three of these words, as the name or a part thereof under which he or it does business, or advertises or otherwise represents falsely by any device whatsoever that his or its deposit liabilities, obligations, certificates, or shares are insured or guaranteed by the Federal Deposit Insurance Corporation, or by the United States or by any instrumentality thereof, or whoever advertises that his or its deposits, shares, or accounts are federally insured, or falsely advertises or otherwise represents by any device whatsoever the extent to which or the manner in which the deposit liabilities of an insured bank or banks are insured by the Federal Deposit Insurance Corporation; or

Whoever, other than a bona fide organization or association of Federal or State credit unions or except as permitted by the laws of the United States, uses as a firm or business name or transacts business using the words "National Credit Union", "National Credit Union Administration", "National Credit Union Board", "National Credit Union Share Insurance Fund", "Share Insurance", or "Central Liquidity Facility", or the letters "NCUA", "NCUSIF", or "CLF", or any other combination or variation of those words or letters alone or with other words or letters, or any device or symbol or other means, reasonably calculated to convey the false impression that such name or business has some connection with, or authorization from, the National Credit Union Administration, the Government of the United States, or any agency thereof, which does not in fact exist, or falsely advertises or otherwise represents by any device whatsoever that his or its business, product, or service has been in any way endorsed, authorized, or approved by the National Credit Union Administration, the Government of the United States, or any agency thereof, or falsely advertises or otherwise represents by any device whatsoever that his or its deposit liabilities, obligations, certificates, shares, or accounts are insured under the Federal Credit Union Act or by the United States or any instrumentality thereof, or being an insured credit union as defined in that Act falsely advertises or otherwise represents by any device whatsoever the extent to which or the manner in which share holdings in such credit union are insured under such Act; or

Whoever, not being organized under chapter 7 of Title 12, advertises or represents that it makes Federal Farm loans or advertises or offers for sale as Federal Farm loan bonds any bond not issued under chapter 7 of Title 12, or uses the word "Federal" or the words "United States" or any other words implying Government ownership, obligation or supervision in advertising or offering for sale any bond, note, mortgage or other security not issued by the Government of the United States under the provisions of said chapter 7 or some other Act of Congress; or

Whoever uses the words "Federal Home Loan Bank" or any combination or variation of these words alone or with other words as a business name or part of a business name, or falsely publishes, advertises or represents by any device or symbol or other means reasonably calculated to convey the impression that he or it is a Federal Home Loan Bank or member of or subscriber for the stock of a Federal Home Loan Bank; or

Whoever uses the words "National Agricultural Credit Corporation" as part of the business or firm name of a person, corporation, partnership, business trust, association or other business entity not organized under the laws of the United States as a National Agricultural Credit Corporation; or

Whoever uses the words "Federal intermediate credit bank" as part of the business or firm name for any person, corporation, partnership, business trust, association or other business entity not organized as an intermediate credit bank under the laws of the United States; or

Whoever uses as a firm or business name the words "Department of Housing and Urban Development", "Housing and Home Finance Agency", "Federal Housing Administration", "Government National Mortgage Association", "United States Housing Authority", or "Public Housing Administration" or the letters "HUD", "FHA", "PHA", or "USHA", or any combination or variation of those words or the letters "HUD", "FHA", "PHA", or "USHA" alone or with other words or letters reasonably calculated to convey the false impression that such name or business has some connection with, or authorization from, the Department of Housing and Urban Development, the Housing and Home Finance Agency, the Federal Housing Administration, the Government National Mortgage Association, the United States Housing Authority, the Public Housing Administration, the Government of the United States, or any agency thereof, which does not in fact exist, or falsely claims that any repair, improvement, or alteration of any existing structure is required or recommended by the Department of Housing and Urban Development, the Housing and Home Finance Agency, the Federal Housing Administration, the Government National Mortgage Association, the United States Housing Authority, the Public Housing Administration, the Government of the United States, or any agency thereof, for the purpose of inducing any person to enter into a contract for the making of

such repairs, alterations, or improvements, or falsely advertises or falsely represents by any device whatsoever that any housing unit, project, business, or product has been in any way endorsed, authorized, inspected, appraised, or approved by the Department of Housing and Urban Development, the Housing and Home Finance Agency, the Federal Housing Administration, the Government National Mortgage Association, the United States Housing Authority, the Public Housing Administration, the Government of the United States, or any agency thereof; or

Whoever, except with the written permission of the Director of the Federal Bureau of Investigation, knowingly uses the words "Federal Bureau of Investigation" or the initials "F.B.I.", or any colorable imitation of such words or initials, in connection with any advertisement, circular, book, pamphlet or other publication, play, motion picture, broadcast, telecast, or other production, in a manner reasonably calculated to convey the impression that such advertisement, circular, book, pamphlet or other publication, play, motion picture, broadcast, telecast, or other production, is approved, endorsed, or authorized by the Federal Bureau of Investigation; or

Whoever uses as a firm or business name the words "Reconstruction Finance Corporation" or any combination or variation of these words—

Shall be punished as follows: a corporation, partnership, business trust, association, or other business entity, by a fine of not more than $1,000; an officer or member thereof participating or knowingly acquiescing in such violation or any individual violating this section, by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

This section shall not make unlawful the use of any name or title which was lawful on the date of enactment of this title.

This section shall not make unlawful the use of the word "national" as part of the name of any business or firm engaged in the insurance or indemnity business, whether such firm was engaged in the insurance or indemnity business prior or subsequent to the date of enactment of this paragraph.

A violation of this section may be enjoined at the suit of the United States Attorney, upon complaint by any duly authorized representative of any department or agency of the United States.

(As amended Sept. 21, 1950, c. 967, § 3(a), 64 Stat. 894; Oct. 31, 1951, c. 655, § 22, 65 Stat. 719; July 3, 1952, c. 547, 66 Stat. 321; Aug. 2, 1954, c. 649, Title I, § 131, 68 Stat. 609; Aug. 27, 1954, c. 1008, 68 Stat. 867; May 25, 1967, Pub.L. 90–19, § 24(b), 81 Stat. 27; Aug. 1, 1968, Pub.L. 90–448, Title VIII, § 807(i), 82 Stat. 545; Oct. 19, 1970, Pub.L. 91–468, § 5, 84 Stat. 1016; Nov. 10, 1978, Pub.L. 95–630, Title XVIII, § 1804, 92 Stat. 3723.)

HISTORICAL AND REVISION NOTES

Based on sections 264(v)(1), 583, 584, 585, 586, 587, 1128, 1318, 1441(d), 1731(d) of title 12, U.S.C., 1940 ed., Banks and Banking, section 616(d) of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 1426 of title 42, U.S.C., 1940 ed., The Public Health and Welfare (R.S. § 5243; Dec. 23, 1913, ch. 6, § 12B(v), as added June 16, 1933, ch. 89, § 8, 48 Stat. 178; July 17, 1916, ch. 245, § 211h, as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1461; Mar. 4, 1923, ch. 252, title II, § 216, 42 Stat. 1471; May 24, 1926, ch. 377, §§ 1–4, 44 Stat. 628; Jan. 22, 1932, ch. 8, § 16(d), 47 Stat. 12; July 22, 1932, ch. 522, § 21, 47 Stat. 738; June 27, 1934, ch. 847, § 512, 48 Stat. 1265; Aug. 23, 1935, ch. 614, §§ 101, 203a, 318, 332, 49 Stat. 684, 704, 712, 719; Apr. 21, 1936, ch. 244, 49 Stat. 1237; Sept. 1, 1937, ch. 896, § 26, 50 Stat. 899; Feb. 3, 1938, ch. 13, §§ 9, 10, 52 Stat. 24, 25; June 28, 1941, ch. 261, § 10, 55 Stat. 365).

Numerous sections were consolidated with changes both of phraseology and substance necessary to effect consolidation.

The proviso of section 585 of said title 12 was omitted, since the consolidated section obviously cannot be construed as forbidding Federal agencies, boards, and corporations from using their legal names. The right to continue the use of a name, lawful on the effective date of this section, is preserved.

Last paragraph is based upon section 587 of said title 12. Words "At the suit of" were substituted for "at the instance of". United States Attorneys are the chief law officers of the districts. *United States v. Smith*, 1895, 15 S.Ct. 846, 158 U.S. 346, 39 L.Ed. 1011; *McKay v. Rogers*, C.C.A.Okl.1936, 82 F.2d 795. Federal courts will not recognize suits on behalf of the United States unless the Government is represented by a United States Attorney. Confiscation cases, La.1868, 7 Wall. 454, 19 L.Ed. 196.

The words "any duly authorized representative of any department or agency of the United States" were substituted for the enumeration of agencies which may make complaint thus making the provision more flexible and less cumbersome.

This consolidated section reconciles the disparities and inconsistencies of 12 sections; thus providing a harmonious scheme for the punishment of similar offenses.

The punishment provision was drawn from section 587 of title 12, U.S.C., 1940 ed., Banks and Banking, but is in substance and effect the same as in sections 264v(1), 1441(d) and 1731(d) of said title 12, but the civil penalty of $50 per day which was in sections 583, 1128, and 1318 of said title 12, was omitted as inconsistent with later acts dealing with similar offenses. Too often actions to recover civil penalties result in judgments which cannot be collected, and yet as long as they remain uncollected they clog the administration of justice.

It was necessary to substitute a fine in place of a $50 per diem penalty for business entities embraced in sections 583, 1128, and 1318 of said title 12, and fine and imprisonment for individuals responsible for such violations. Similarly the penalty of $1,000 fine in section 1426

of title 42, The Public Health and Welfare, was changed to permit alternative fine or imprisonment for individuals responsible for violation.

References in Text. The Federal Credit Union Act, referred to in text, is classified generally to section 1751 et seq. of Title 12, U.S.C.A., Banks and Banking.

Chapter 7 of Title 12, referred to in text, contained the Federal Farm Loan Act, which was repealed. See now the Farm Credit Act of 1971.

"Prior or subsequent to the enactment of this paragraph," referred to in text, means July 3, 1952.

Transfer of Functions. All the functions, powers, and duties of the Housing and Home Finance Agency, the Federal Housing Administration, and the Public Housing Authority were transferred to the Secretary of Housing and Urban Development.

The United States Housing Authority was consolidated with other agencies into the Housing and Home Finance Agency and the name of the authority was changed to the Public Housing Administration.

Abolition of Reconstruction Finance Corporation. The Reconstruction Finance Corporation was abolished.

§ 710. Cremation urns for military use

Whoever knowingly uses, manufactures, or sells any cremation urn of a design approved by the Secretary of Defense for use to retain the cremated remains of deceased members of the armed forces or an urn which is a colorable imitation of the approved design, except when authorized under regulation made pursuant to law, shall be fined not more than $250 or imprisoned for not more than six months, or both.

(Added Sept. 28, 1950, c. 1092, § 1, 64 Stat. 1077.)

§ 711. "Smokey Bear" character or name

Whoever, except as authorized under rules and regulations issued by the Secretary of Agriculture after consultation with the Association of State Foresters and the Advertising Council, knowingly and for profit manufactures, reproduces, or uses the character "Smokey Bear", originated by the Forest Service, United States Department of Agriculture, in cooperation with the Association of State Foresters and the Advertising Council for use in public information concerning the prevention of forest fires, or any facsimile thereof, or the name "Smokey Bear" shall be fined not more than $250 or imprisoned not more than six months, or both.

The Secretary of Agriculture may specially authorize the manufacture, reproduction, or use of the character "Smokey Bear" for a period not to exceed one hundred and eighty days, expiring no later than one year after the enactment hereof, by any person who, because of plans or commitments made prior to the enactment of this Act, would suffer substantial loss if denied such authorization.

(Added May 23, 1952, c. 327, § 1, 66 Stat. 92, and amended June 22, 1974, Pub.L. 93-318, § 5, 88 Stat. 245.)

References in Text. Words "no later than one year after the enactment hereof" and "prior to the enactment of this Act", referred to in text, have reference to May 23, 1952.

§ 711a. "Woodsy Owl" character, name, or slogan

Whoever, except as authorized under rules and regulations issued by the Secretary, knowingly and for profit manufactures, reproduces, or uses the character "Woodsy Owl", the name "Woodsy Owl", or the associated slogan, "Give a Hoot, Don't Pollute" shall be fined not more than $250 or imprisoned not more than six months, or both.

(Added Pub.L. 93-318, § 6, June 22, 1974, 88 Stat. 245.)

§ 712. Misuse of names, words, emblems, or insignia

Whoever, in the course of collecting or aiding in the collection of private debts or obligations, or being engaged in furnishing private police, investigation, or other private detective services, uses or employs in any communication, correspondence, notice, advertisement, or circular the words "national", "Federal", or "United States", the initials "U.S.", or any emblem, insignia, or name, for the purpose of conveying and in a manner reasonably calculated to convey the false impression that such communication is from a department, agency, bureau, or instrumentality of the United States or in any manner represents the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(Added Pub.L. 86-291, § 1, Sept. 21, 1959, 73 Stat. 570, and amended Pub.L. 93-147, § 1(a), Nov. 3, 1973, 87 Stat. 554.)

§ 713. Use of likenesses of the great seal of the United States, and of the seals of the President and Vice President

(a) Whoever knowingly displays any printed or other likeness of the great seal of the United States, or of the seals of the President or the Vice President of the United States, or any facsimile thereof, in, or in connection with, any advertisement, poster, circular, book, pamphlet, or other publication, public meeting, play, motion picture, telecast, or other production, or on any building, monument, or stationery, for the purpose of conveying, or in a manner reasonably calculated to convey, a false impression of sponsorship or approval by the Government of the United States or by any department, agency, or instrumentality

thereof, shall be fined not more than $250 or imprisoned not more than six months, or both.

(b) Whoever, except as authorized under regulations promulgated by the President and published in the Federal Register, knowingly manufactures, reproduces, sells, or purchases for resale, either separately or appended to any article manufactured or sold, any likeness of the seals of the President or Vice President, or any substantial part thereof, except for manufacture or sale of the article for the official use of the Government of the United States, shall be fined not more than $250 or imprisoned not more than six months, or both.

(c) A violation of subsection (a) or (b) of this section may be enjoined at the suit of the Attorney General upon complaint by any authorized representative of any department or agency of the United States.

(Added Pub.L. 89–807, § 1(a), Nov. 11, 1966, 80 Stat. 1525, and amended Pub.L. 91–651, § 1, Jan. 5, 1971, 84 Stat. 1940.)

EXECUTIVE ORDER NO. 11649

Feb. 16, 1972, 37 F.R. 3625, as amended by Ex.Ord.No. 11916, May 28, 1976, 41 F.R. 22031

REGULATIONS GOVERNING SEALS OF PRESIDENT AND VICE PRESIDENT OF UNITED STATES

By virtue of the authority vested in me by section 713(b) of title 18, United States Code [subsec. (b) of this section], I hereby prescribe the following regulations governing the use of the Seals of the President and the Vice President of the United States:

Section 1. Except as otherwise provided by law, the knowing manufacture, reproduction, sale, or purchase for resale of the Seals or Coats of Arms of the President or the Vice President of the United States, or any likeness or substantial part thereof, shall be permitted only for the following uses:

(a) Use by the President or Vice President of the United States;

(b) Use in encyclopedias, dictionaries, books, journals, pamphlets, periodicals, or magazines incident to a description or history of seals, coats of arms, heraldry, or the Presidency or Vice Presidency;

(c) Use in libraries, museums, or educational facilities incident to descriptions or exhibits relating to seals, coats of arms, heraldry, or the Presidency or Vice Presidency;

(d) Use as an architectural embellishment in libraries, museums, or archives established to house the papers or effects of former Presidents or Vice Presidents;

(e) Use on a monument to a former President or Vice President;

(f) Use by way of photographic or electronic visual reproduction in pictures, moving pictures, or telecasts of bona fide news content;

(g) Such other uses for exceptional historical, educational, or newsworthy purposes as may be authorized in writing by the Counsel to the President.

Sec. 2. The manufacture, reproduction, sale, or purchase for resale, either separately or appended to any article manufactured or sold, of the Seals of the President or Vice President, or any likeness or substantial part thereof, except as provided in this Order or as otherwise provided by law, is prohibited.

RICHARD NIXON

[§ 714. Repealed. Pub.L. 97–258, § 2(d)(1)(B), Sept. 13, 1982, 96 Stat. 1058]

§ 715. "The Golden Eagle Insignia"

As used in this section, "The Golden Eagle Insignia" means the words "The Golden Eagle" and the representation of an American Golden Eagle (colored gold) and a family group (colored midnight blue) enclosed within a circle (colored white with a midnight blue border) framed by a rounded triangle (colored gold with a midnight blue border) which was originated by the Department of the Interior as the official symbol for Federal recreation fee areas.

Whoever, except as authorized under rules and regulations issued by the Secretary of the Interior, knowingly manufactures, reproduces, or uses "The Golden Eagle Insignia", or any facsimile thereof, in such a manner as is likely to cause confusion, or to cause mistake, or to deceive, shall be fined not more than $250 or imprisoned not more than six months, or both.

The use of any such emblem, sign, insignia, or words which was lawful on the date of enactment of this Act shall not be a violation of this section.

A violation of this section may be enjoined at the suit of the Attorney General, upon complaint by the Secretary of the Interior.

(Added Pub.L. 92–347, § 3(b), July 11, 1972, 86 Stat. 461.)

References in Text. "The date of enactment of this Act," referred to in text, is July 11, 1972.

CHAPTER 35—ESCAPE AND RESCUE

Sec.
751. Prisoners in custody of institution or officer.
752. Instigating or assisting escape.
753. Rescue to prevent execution.
754. Rescue of body of executed offender.
755. Officer permitting escape.
756. Internee of belligerent nation.
757. Prisoners of war or enemy aliens.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 751. Prisoners in custody of institution or officer

(a) Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of a lawful arrest for a violation of any law of the United States not punishable by death or life imprisonment and committed before such person's eighteenth birthday, and as to whom the Attorney General has not specifically directed the institution of criminal proceedings, or by virtue of a commitment as a juvenile delinquent under section 5034 of this title, be fined not more than $1,000 or imprisoned not more than one year, or both. Nothing herein contained shall be construed to affect the discretionary authority vested in the Attorney General pursuant to section 5032 of this title.

(As amended Dec. 30, 1963, Pub.L. 88–251, § 1, 77 Stat. 834; Sept. 10, 1965, Pub.L. 89–176, § 3, 79 Stat. 675.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 753h, 909 (May 14, 1930, ch. 274, § 9, 46 Stat. 327; May 27, 1930, ch. 339, § 9, 46 Stat. 390; Aug. 3, 1935, ch. 432, 49 Stat. 513).

Sections 753h and 909 of title 18, U.S.C., 1940 ed., were consolidated. Section 753h is later and more comprehensive. The substance of its provisions was adopted.

References to offenses as felonies or misdemeanors were omitted in view of definitive section 1 of this title. (See also reviser's notes under section 550 of this title.)

Mandatory provision as to separate sentences and order of service was omitted in order to permit court to exercise discretion as to whether sentences should be concurrent or consecutive and to obviate administration problems in enforcement of section.

Words "or employee" were inserted to remove ambiguity as to scope of section.

Reference to "custody or confinement is for extradition" was inserted to avoid possible ambiguity.

Changes were made in phraseology and arrangement.

Change of Name. United States commissioners, referred to in text, were replaced by United States magistrates pursuant to Pub.L. 90–578, Oct. 17, 1968, 82 Stat. 1118. See section 631 et seq. of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

§ 752. Instigating or assisting escape

(a) Whoever rescues or attempts to rescue or instigates, aids or assists the escape, or attempt to escape, of any person arrested upon a warrant or other process issued under any law of the United States, or committed to the custody of the Attorney General or to any institution or facility by his direction, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempted escape of any person in the custody of the Attorney General or his authorized representative, or of any person arrested upon a warrant or other process issued under any law of the United States or from any institution or facility in which he is confined by direction of the Attorney General, shall, if the custody or confinement is by virtue of a lawful arrest for a violation of any law of the United States not punishable by death or life imprisonment and committed before such person's eighteenth birthday, and as to whom the Attorney General has not specifically directed the institution of criminal proceedings, or by virtue of a commitment as a juvenile delinquent under section 5034 of this title, be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended May 28, 1956, c. 331, 70 Stat. 216; Dec. 30, 1963, Pub.L. 88–251, § 2, 77 Stat. 834; Sept. 10, 1965, Pub.L. 89–176, § 3, 79 Stat. 675.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 246, 247, 252, 661, 662c, 753i, 910 (R.S. § 5277; Mar. 4, 1909, ch. 321, §§ 141, 143, 35 Stat. 1114; May 14, 1930, ch. 274, § 10, 46 Stat. 327; May 27, 1930, ch. 339, § 10, 46 Stat. 390; Mar. 22, 1934, ch. 73, § 2, 48 Stat. 455; May 18, 1934, ch. 303, § 1, 48 Stat. 782).

Section consolidated escape and rescue provisions of sections 246, 247, 252, 661, 662c, 753i, and 910 of title 18, U.S.C., 1940 ed. Remaining provisions of those sections are in sections 1071, 1072, 1502, 1792, 3183, and 3195 of this title.

No two sections provided the same punishment. Every section except said section 252 made the offense a misdemeanor by providing for fines varying from $500 to $1,000 and terms of imprisonment varying from 6 months to 1 year. Said section 252, representing the latest expression by Congress, provided for 10 years' imprisonment.

The punishment provision was adopted from section 751 of this title, which makes it unlawful for a prisoner to escape from his place of confinement. Thus the same punishment would apply to the person aiding in an escape as to the person escaping.

The language of this section reconciles the conflict by adopting a penalty which is a compromise between the varying provisions.

Reference to "extradition" was inserted to avoid ambiguity and to harmonize section with section 751 of this title.

References to "force" were omitted as well as those to "officer" or "custody." See definition of "Rescue," Black's Law Dictionary, citing 4 Bl. Comm. 131.

Changes were made in phraseology.

§ 753. Rescue to prevent execution

Whoever, by force, sets at liberty or rescues any person found guilty in any court of the United States of any capital crime, while going to execution or during execution, shall be fined not more than $25,000 or imprisoned not more than twenty-five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 248 (Mar. 4, 1909, ch. 321, § 142, 35 Stat. 1114).

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 754. Rescue of body of executed offender

Whoever, by force, rescues or attempts to rescue, from the custody of any marshal or his officers, the dead body of an executed offender, while it is being conveyed to a place of dissection, as provided by section 3567 of this title, or by force rescues or attempts to rescue such body from the place where it has been deposited for dissection in pursuance of said section 3567, shall be fined not more than $100 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 249 (Mar. 4, 1909, ch. 321, § 144, 35 Stat. 1114).

Minor changes were made in phraseology.

§ 755. Officer permitting escape

Whoever, having in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge, or commissioner, voluntarily suffers such prisoner to escape, shall be fined not more than $2,000 or imprisoned not more than two years, or both; or if he negligently suffers such person to escape, he shall be fined not more than $500 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 244, 662e, 665, (Feb. 6, 1905, ch. 454, § 2, 33 Stat. 698; Mar. 4, 1909, ch. 321, §§ 138, 139, 35 Stat. 1113; Mar. 22, 1934, ch. 73, § 4, 48 Stat. 456).

Sections 244, 662e and 665 of title 18, U.S.C., 1940 ed., were consolidated. The two latter sections merely extended application of the former. This section has been greatly condensed by changes in phraseology which do not affect the substance.

Enumeration of "marshal, deputy marshal, ministerial officer, or other person," was omitted as surplusage.

Provision making section applicable to cases of prisoners in custody pending extradition or removal proceedings as well as prisoners convicted of offenses against the United States was likewise omitted as unnecessary.

Changes in phraseology were made.

Change of Name. United States commissioners, referred to in text, were replaced by United States magistrates pursuant to Pub.L. 90-578, Oct. 17, 1968, 82 Stat. 1118. See sections 631 et seq. of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

§ 756. Internee of belligerent nation

Whoever, within the jurisdiction of the United States, aids or entices any person belonging to the armed forces of a belligerent nation or faction who is interned in the United States in accordance with the law of nations, to escape or attempt to escape from the jurisdiction of the United States or from the limits of internment prescribed, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 37 (June 15, 1917, ch. 30, title V, § 7, 40 Stat. 223).

Section was divided. Remaining provisions relating to arrest appear in section 3058 of this title.

Minor changes in phraseology were made.

§ 757. Prisoners of war or enemy aliens

Whoever procures the escape of any prisoner of war held by the United States or any of its allies, or the escape of any person apprehended or interned as an enemy alien by the United States or any of its allies, or advises, connives at, aids, or

assists in such escape, or aids, relieves, transports, harbors, conceals, shelters, protects, holds correspondence with, gives intelligence to, or otherwise assists any such prisoner of war or enemy alien, after his escape from custody, knowing him to be such prisoner of war or enemy alien, or attempts to commit or conspires to commit any of the above acts, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The provisions of this section shall be in addition to and not in substitution for any other provision of law.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 97b (Apr. 30, 1945, ch. 103, 59 Stat. 101).

The second sentence of section 97b of title 18, U.S.C., 1940 ed., was made a separate paragraph.

CHAPTER 37—ESPIONAGE AND CENSORSHIP

Sec.

[791. Repealed.]
792. Harboring or concealing persons.
793. Gathering, transmitting, or losing defense information.
794. Gathering or delivering defense information to aid foreign government.
795. Photographing and sketching defense installations.
796. Use of aircraft for photographing defense installations.
797. Publication and sale of photographs of defense installations.
798.[1] Disclosure of classified information.
798.[1] Temporary extension of section 794.
799. Violation of regulations of National Aeronautics and Space Administration.

[1] So enacted.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

[§ 791. Repealed. Pub.L. 87–369, § 1, Oct. 4, 1961, 75 Stat. 795]

§ 792. Harboring or concealing persons

Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under sections 793 or 794 of this title, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on section 35 of title 50, U.S.C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title I, § 5, 40 Stat. 219; Mar. 28, 1940, ch. 72, § 2, 54 Stat. 79).

Similar harboring and concealing language was added to section 2388 of this title.

Mandatory punishment provision was rephrased in the alternative.

§ 793. Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance,

or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(As amended Sept. 23, 1950, c. 1024, § 18, 64 Stat. 1003.)

HISTORICAL AND REVISION NOTES

Based on sections 31 and 36 of title 50, U.S.C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title I, §§ 1, 6, 40 Stat. 217, 219; Mar. 28, 1940, ch. 72, § 1, 54 Stat. 79).

Section consolidated sections 31 and 36 of title 50, U.S.C., 1940 ed., War and National Defense.

Words "departments or agencies" were inserted twice in conformity with definitive section 6 of this title to eliminate any possible ambiguity as to scope of section.

The words "or induces or aids another" were omitted wherever occurring as unnecessary in view of definition of "principal" in section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with

respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(As amended Sept. 3, 1954, c. 1261, Title II, § 201, 68 Stat. 1219.)

HISTORICAL AND REVISION NOTES

Based on sections 32 and 34 of title 50, U.S.C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title I, §§ 2, 4, 40 Stat. 218, 219).

Section consolidates sections 32 and 34 of title 50, U.S.C., 1940 ed., War and National Defense.

The words "or induces or aids another" were omitted as unnecessary in view of definition of "principal" in section 2 of this title.

The conspiracy provision of said section 34 was also incorporated in section 2388 of this title.

Minor changes were made in phraseology.

§ 795. Photographing and sketching defense installations

(a) Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station, or naval vessels, military and naval aircraft, and any separate military or naval command concerned, or higher authority, and promptly submitting the product obtained to such commanding officer or higher authority for censorship or such other action as he may deem necessary.

(b) Whoever violates this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on sections 45 and 45c of title 50, U.S.C., 1940 ed., War and National Defense (Jan. 12, 1938, ch. 2, §§ 1, 4, 52 Stat. 3, 4).

Section consolidated sections 45 and 45c of title 50, U.S.C., 1940 ed., War and National Defense.

Minor changes were made in phraseology.

EXECUTIVE ORDER NO. 10104

Feb. 1, 1950, 15 F.R. 597

DEFINITIONS OF VITAL MILITARY AND NAVAL INSTALLATIONS AND EQUIPMENT

Now, therefore, by virtue of the authority vested in me by the foregoing statutory provisions, and in the interests of national defense, I hereby define the following as vital military and naval installations or equipment requiring protection against the general dissemination of information relative thereto:

1. All military, naval, or air-force installations and equipment which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret" [sic] "secret" [sic] "confidential", or "restricted" and all military, naval, or air-force installations and equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President, and located within:

(a) Any military, naval, or air-force reservation, post, arsenal, proving ground, range, mine field, camp, base, airfield, fort, yard, station, district, or area.

(b) Any defensive sea area heretofore established by Executive order and not subsequently discontinued by Executive order, and any defensive sea area hereafter established under authority of section 2152 of Title 18 of the United States Code.

(c) Any airspace reservation heretofore or hereafter established under authority of section 4 of the Air Commerce Act of 1926 (44 Stat. 570; 49 U.S.C. 174) except the airspace reservation established by Executive Order No. 10092 of December 17, 1949.

(d) Any naval harbor closed to foreign vessels.

(e) Any area required for fleet purposes.

(f) Any commercial establishment engaged in the development or manufacture of classified military or naval arms, munitions, equipment, designs, ships, aircraft, or vessels for the United States Army, Navy, or Air Force.

2. All military, naval, or air-force aircraft, weapons, ammunition, vehicles, ships, vessels, instruments, engines, manufacturing machinery, tools, devices, or any other equipment whatsoever, in the possession of the Army, Navy, or Air Force or in the course of experimentation, development, manufacture, or delivery for the Army, Navy, or Air Force which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret", "confidential", or "restricted", and all such articles, materials, or equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President.

3. All official military, naval, or air-force books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts, or specifications which are now marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as "top secret", "secret",

"confidential" or "restricted" and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President.

This order supersedes Executive Order No. 8381 of March 22, 1940, entitled "Defining Certain Vital Military and Naval Installations and Equipment."

§ 796. Use of aircraft for photographing defense installations

Whoever uses or permits the use of an aircraft or any contrivance used, or designed for navigation or flight in the air, for the purpose of making a photograph, sketch, picture, drawing, map, or graphical representation of vital military or naval installations or equipment, in violation of section 795 of this title, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on sections 45, 45a, and 45c of title 50, U.S.C., 1940 ed., War and National Defense (Jan. 12, 1938, ch. 2, §§ 1, 2, 4, 52 Stat. 3, 4).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Punishment provided by section 795 of this title is repeated and is from said section 45 of title 50, U.S.C., 1940 ed.

Minor changes were made in phraseology.

§ 797. Publication and sale of photographs of defense installations

On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on sections 45 and 45b, of title 50, U.S.C., 1940 ed., War and National Defense (Jan. 12, 1938, ch. 2, §§ 1, 3, 52 Stat. 3).

Punishment provision of section 45 of title 50, U.S.C., 1940 ed., War and National Defense, is repeated. Words "upon conviction" were deleted as surplusage since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

§ 798. Disclosure of classified information [1]

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.

(Added Oct. 31, 1951, c. 655, § 24(a), 65 Stat. 719.)

[1] So enacted. See second section 798 enacted on June 30, 1953, set out below.

§ 798. Temporary extension of section 794 [1]

The provisions of section 794 of this title, as amended and extended by section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under section 794 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

(Added June 30, 1953, c. 175, § 4, 67 Stat. 134.)

[1] So enacted. See first section 798 enacted on Oct. 31, 1951, set out above.

References in Text. Section 1(a)(29) of the Emergency Powers Continuation Act, referred to in text, was repealed.

Proc. 2912, 3 C.F.R., 1950 Supp., p. 71, referred to in text, means Proc. 2914.

§ 799. Violation of regulations of National Aeronautics and Space Administration

Whoever willfully shall violate, attempt to violate, or conspire to violate any regulation or order promulgated by the Administrator of the National Aeronautics and Space Administration for the protection or security of any laboratory, station, base or other facility, or part thereof, or any aircraft, missile, spacecraft, or similar vehicle, or part thereof, or other property or equipment in the custody of the Administration, or any real or personal property or equipment in the custody of any contractor under any contract with the Administration or any subcontractor of any such contractor, shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(Added Pub.L. 85–568, Title III, § 304(c)(1), July 29, 1958, 72 Stat. 434.)

CHAPTER 39—EXPLOSIVES AND OTHER DANGEROUS ARTICLES

Sec.

831. Prohibited transactions involving nuclear materials.
[832 to 835. Repealed.]
836. Transportation of fireworks into State prohibiting sale or use.
[837. Repealed.]

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 831. Prohibited transactions involving nuclear materials

(a) Whoever, if one of the circumstances described in subsection (c) of this section occurs—

(1) without lawful authority, intentionally receives, possesses, uses, transfers, alters, disposes of, or disperses any nuclear material and—

(A) thereby knowingly causes the death of or serious bodily injury to any person or substantial damage to property; or

(B) knows that circumstances exist which are likely to cause the death of or serious bodily injury to any person or substantial damage to property;

(2) with intent to deprive another of nuclear material, knowingly—

(A) takes and carries away nuclear material of another without authority;

(B) makes an unauthorized use, disposition, or transfer, of nuclear material belonging to another; or

(C) uses fraud and thereby obtains nuclear material belonging to another;

(3) knowingly—

(A) uses force; or

(B) threatens or places another in fear that any person other than the actor will imminently be subject to bodily injury;

and thereby takes nuclear material belonging to another from the person or presence of any other;

(4) intentionally intimidates any person and thereby obtains nuclear material belonging to another;

(5) with intent to compel any person, international organization, or governmental entity to do

or refrain from doing any act, knowingly threatens to engage in conduct described in paragraph (2)(A) or (3) of this subsection;

(6) knowingly threatens to use nuclear material to cause death or serious bodily injury to any person or substantial damage to property under circumstances in which the threat may reasonably be understood as an expression of serious purposes;

(7) attempts to commit an offense under paragraph (1), (2), (3), or (4) of this subsection; or

(8) is a party to a conspiracy of two or more persons to commit an offense under paragraph (1), (2), (3), or (4) of this subsection, if any of the parties intentionally engages in any conduct in furtherance of such offense;

shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under—

(1) paragraphs (1) through (7) of subsection (a) of this section is—

(A) a fine of not more than $250,000; and

(B) imprisonment—

(i) for any term of years or for life (I) if, while committing the offense, the offender knowingly causes the death of any person; or (II) if, while committing an offense under paragraph (1) or (3) of subsection (a) of this section, the offender, under circumstances manifesting extreme indifference to the life of an individual, knowingly engages in any conduct and thereby recklessly causes the death of or serious bodily injury to any person; and

(ii) for not more than 20 years in any other case; and

(2) paragraph (8) of subsection (a) of this section is—

(A) a fine of not more than $250,000; and

(B) imprisonment—

(i) for not more than 20 years if the offense which is the object of the conspiracy is punishable under paragraph (1)(B)(i); and

(ii) for not more than 10 years in any other case.

(c) The circumstances referred to in subsection (a) of this section are that—

(1) the offense is committed in the United States or the special maritime and territorial jurisdiction of the United States, or the special aircraft jurisdiction of the United States (as defined in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301));

(2) the defendant is a national of the United States, as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101);

(3) at the time of the offense the nuclear material is in use, storage, or transport, for peaceful purposes, and after the conduct required for the offense occurs the defendant is found in the United States, even if the conduct required for the offense occurs outside the United States; or

(4) the conduct required for the offense occurs with respect to the carriage of a consignment of nuclear material for peaceful purposes by any means of transportation intended to go beyond the territory of the state where the shipment originates beginning with the departure from a facility of the shipper in that state and ending with the arrival at a facility of the receiver within the state of ultimate destination and either of such states is the United States.

(d) The Attorney General may request assistance from the Secretary of Defense under chapter 18 of title 10 in the enforcement of this section and the Secretary of Defense may provide such assistance in accordance with chapter 18 of title 10, except that the Secretary of Defense may provide such assistance through any Department of Defense personnel.

(e)(1) The Attorney General may also request assistance from the Secretary of Defense under this subsection in the enforcement of this section. Notwithstanding section 1385 of this title, the Secretary of Defense may, in accordance with other applicable law, provide such assistance to the Attorney General if—

(A) an emergency situation exists (as jointly determined by the Attorney General and the Secretary of Defense in their discretion); and

(B) the provision of such assistance will not adversely affect the military preparedness of the United States (as determined by the Secretary of Defense in such Secretary's discretion).

(3) [1] As used in this subsection, the term "emergency situation" means a circumstance—

(A) that poses a serious threat to the interests of the United States; and

(B) in which—

(i) enforcement of the law would be seriously impaired if the assistance were not provided; and

(ii) civilian law enforcement personnel are not capable of enforcing the law.

(4) Assistance under this section may include—

(A) use of personnel of the Department of Defense to arrest persons and conduct searches and seizures with respect to violations of this section; and

(B) such other activity as is incidental to the enforcement of this section, or to the protection

of persons or property from conduct that violates this section.

(5) The Secretary of Defense may require reimbursement as a condition of assistance under this section.

(6) The Attorney General may delegate the Attorney General's function under this subsection only to a Deputy, Associate, or Assistant Attorney General.

(f) As used in this section—

(1) the term "nuclear material" means material containing any—

(A) plutonium with an isotopic concentration not in excess of 80 percent plutonium 238;

(B) uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature;

(C) uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or

(D) uranium 233;

(2) the term "international organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288) or a public organization created pursuant to treaty or other agreement under international law as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs;

(3) the term "serious bodily injury" means bodily injury which involves—

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(4) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of a function of a bodily member, organ or mental faculty; or

(E) any other injury to the body, no matter how temporary.

(Added Pub.L. 97–351, § 2(a), Oct. 15, 1982, 96 Stat. 1663.)

[1] So in original. No par. (2) was enacted.

References in Text. Section 101 of the Federal Aviation Act of 1958, referred to in subsec. (c)(1), is classified to section 1301 of Title 49, U.S.C.A., Transportation.

Section 101 of the Immigration and Nationality Act, referred to in subsec. (c)(2), is classified to section 1101 of Title 8, U.S.C.A., Aliens and Nationality.

Section 1 of the International Organizations Immunities Act, referred to in subsec. (f)(2), is classified to section 288 of Title 22, U.S.C.A., Foreign Relations and Intercourse.

Prior Provisions. A prior section 831, Acts June 25, 1948, c. 645, 62 Stat. 738; Sept. 6, 1960, Pub.L. 86–710, 74 Stat. 808; July 27, 1965, Pub.L. 89–95, 79 Stat. 285; Oct. 17, 1978, Pub.L. 95–473, § 2(a)(1)(A), 92 Stat. 1464, which defined terms used in this chapter, was repealed by Pub.L. 96–129, Title II, § 216(b), Nov. 30, 1979, 93 Stat. 1015. For savings provisions regarding former section 831, see section 218 of Pub.L. 96–129 set out as a note under former sections 832, 833 of this title.

[§§ 832 to 835. Repealed. Pub.L. 96–129, Title II, § 216(b), Nov. 30, 1979, 93 Stat. 1015]

Savings Provisions. Section 218 of Pub.L. 96–129 provided that:

"(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges which have been issued, made, granted, or allowed to become effective under the provisions of chapter 39 of title 18, United States Code [this chapter] repealed by this title [Title II of Pub.L. 96–129 which repealed sections 831 to 835 of this title] and which are in effect at the time this title takes effect [Nov. 30, 1979], shall continue in effect as though issued, made, granted or allowed to become effective under the authority of this title, according to their terms until modified, terminated, superseded, set aside, or repealed by the Secretary, by any court of competent jurisdiction, or by operation of law.

"(b) Suits, actions, or other proceedings pending upon the date of enactment of this title [Nov. 30, 1979] shall not be affected by the provisions of this title [enacting section 2001 et seq. of Title 49, U.S.C.A., Transportation, amending section 1811 of Title 49, and repealing sections 831 to 835 of this title] and shall be completed as if this title had not been enacted, unless the Secretary makes a determination that the public safety otherwise requires."

§ 836. Transportation of fireworks into State prohibiting sale or use

Whoever, otherwise than in the course of continuous interstate transportation through any State, transports fireworks into any State, or delivers them for transportation into any State, or attempts so to do, knowing that such fireworks are to be delivered, possessed, stored, transshipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not apply to a common or contract carrier or to international or domestic wa-

ter carriers engaged in interstate commerce or to the transportation of fireworks into a State for the use of Federal agencies in the carrying out or the furtherance of their operations.

In the enforcement of this section, the definitions of fireworks contained in the laws of the respective States shall be applied.

As used in this section, the term "State" includes the several States, Territories, and possessions of the United States, and the District of Columbia.

This section shall be effective from and after July 1, 1954.

(Added June 4, 1954, c. 261, § 1, 68 Stat. 170.)

Fireworks for Agricultural Purposes. Section 3 of act June 4, 1954, provided that this section should not be effective with respect to—

"(1) the transportation of fireworks into any State or Territory for use solely for agricultural purposes,

"(2) the delivery of fireworks for transportation into any State or Territory for use solely for agricultural purposes, or

"(3) any attempt to engage in any such transportation or delivery for use solely for agricultural purposes, until sixty days have elapsed after the commencement of the next regular session of the legislature of such State or Territory which begins after the date of enactment of this Act [June 4, 1954]."

[§ 837. Repealed. Pub.L. 91–452, Title XI, § 1106(b)(1), Oct. 15, 1970, 84 Stat. 960]

CHAPTER 40—IMPORTATION, MANUFACTURE, DISTRIBUTION AND STORAGE OF EXPLOSIVE MATERIALS

Sec.

841. Definitions.
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Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 841. Definitions

As used in this chapter—

(a) "Person" means any individual, corporation, company, association, firm, partnership, society, or joint stock company.

(b) "Interstate or foreign commerce" means commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, and commerce between places within the same State but through any place outside of that State. "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

(c) "Explosive materials" means explosives, blasting agents, and detonators.

(d) Except for the purposes of subsections (d), (e), (f), (g), (h), (i), and (j) of section 844 of this title, "explosives" means any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion; the term includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters. The Secretary shall publish and revise at least annually in the Federal Register a list of these and any additional explosives which he determines to be within the coverage of this chapter. For the purposes of subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, the term "explosive" is defined in subsection (j) of such section 844.

(e) "Blasting agent" means any material or mixture, consisting of fuel and oxidizer, intended for blasting, not otherwise defined as an explosive: *Provided*, That the finished product, as mixed for use or shipment, cannot be detonated by means of a numbered 8 test blasting cap when unconfined.

(f) "Detonator" means any device containing a detonating charge that is used for initiating detonation in an explosive; the term includes, but is not limited to, electric blasting caps of instantaneous and delay types, blasting caps for use with safety fuses and detonating-cord delay connectors.

(g) "Importer" means any person engaged in the business of importing or bringing explosive materials into the United States for purposes of sale or distribution.

(h) "Manufacturer" means any person engaged in the business of manufacturing explosive materials for purposes of sale or distribution or for his own use.

(i) "Dealer" means any person engaged in the business of distributing explosive materials at wholesale or retail.

(j) "Permittee" means any user of explosives for a lawful purpose, who has obtained a user permit under the provisions of this chapter.

(k) "Secretary" means the Secretary of the Treasury or his delegate.

(*l*) "Crime punishable by imprisonment for a term exceeding one year" shall not mean (1) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (2) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

(m) "Licensee" means any importer, manufacturer, or dealer licensed under the provisions of this chapter.

(n) "Distribute" means sell, issue, give, transfer, or otherwise dispose of.

(Added Pub.L. 91–452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 952.)

Transfer of Functions. For transfer of certain enforcement functions of the Secretary or other official in the Department of Treasury under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, see sections 102(g) and 203(a) of Reorg. Plan No. 1 of 1979, set out under section 719e of Title 15, U.S.C.A., Commerce and Trade.

Congressional Declaration of Purpose. Section 1101 of Pub.L. 91–452 provided that: "The Congress hereby declares that the purpose of this title [Title XI of Pub.L. 91–452] is to protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials. It is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, storage, or use of explosive materials for industrial, mining, agricultural, or other lawful purposes, or to provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

Modification of Other Provisions. Section 1104 of Pub.L. 91–452 provided that:

"Nothing in this title [enacting this chapter, amending section 2516 of this title, repealing section 837 of this title and sections 121 to 144 of Title 50, U.S.C.A., War and National Defense, and enacting provisions set out as notes under this section] shall be construed as modifying or affecting any provision of—

"(a) The National Firearms Act (chapter 53 of the Internal Revenue Code of 1954) [section 5801 et seq. of Title 26, U.S.C.A., Internal Revenue Code];

"(b) Section 414 of the Mutual Security Act of 1954 (22 U.S.C. 1934), as amended, relating to munitions control;

"(c) Section 1716 of title 18, United States Code, relating to nonmailable materials;

"(d) Sections 831 through 836 of title 18, United States Code; or

"(e) Chapter 44 of title 18, United States Code."

Continuation in Business or Operation of Any Person Engaged in Business or Operation on October 15, 1970. Section 1105(c) of Pub.L. 91–452 provided that:

"Any person (as defined in section 841(a) of title 18, United States Code) engaging in a business or operation requiring a license or permit under the provisions of chapter 40 of such title 18, who was engaged in such business or operation on the date of enactment of this Act [Oct. 15, 1970] and who has filed an application for a license or permit under the provisions of section 843 of such chapter 40 prior to the effective date of such section 843 [see section 1105(a), (b) of Pub.L. 91–452] may continue such business or operation pending final action on his application. All provisions of such chapter 40 shall apply to such applicant in the same manner and to the same extent as if he were a holder of a license or permit under such chapter 40."

Authorization of Appropriations. Section 1107 of Pub.L. 91–452 provided that: "There are hereby authorized to be appropriated such sums as are necessary to carry out the purposes of this title [enacting this chapter, amending section 2516 of this title, repealing section 837 of this title and sections 121 to 144 of Title 50, U.S.C.A., War and National Defense, and enacting provisions set as notes under this section]."

§ 842. Unlawful acts

(a) It shall be unlawful for any person—

(1) to engage in the business of importing, manufacturing, or dealing in explosive materials without a license issued under this chapter;

(2) knowingly to withhold information or to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive for the purpose of obtaining explosive materials, or a license, permit, exemption, or relief from disability under the provisions of this chapter; and

(3) other than a licensee or permittee knowingly—

(A) to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials, except that a person who lawfully purchases explosive materials from a licensee in a State contiguous to the State in which the purchaser resides may ship, transport, or cause to be transported such explosive materials to the State in which he resides and may receive such explosive materials in the State in which he resides, if such transportation, shipment, or receipt is permitted by the law of the State in which he resides; or

(B) to distribute explosive materials to any person (other than a licensee or permittee) who the distributor knows or has reasonable cause to believe does not reside in the State in which the distributor resides.

(b) It shall be unlawful for any licensee knowingly to distribute any explosive materials to any person except—

(1) a licensee;

(2) a permittee; or

(3) a resident of the State where distribution is made and in which the licensee is licensed to do business or a State contiguous thereto if permitted by the law of the State of the purchaser's residence.

(c) It shall be unlawful for any licensee to distribute explosive materials to any person who the licensee has reason to believe intends to transport such explosive materials into a State where the purchase, possession, or use of explosive materials is prohibited or which does not permit its residents to transport or ship explosive materials into it or to receive explosive materials in it.

(d) It shall be unlawful for any licensee knowingly to distribute explosive materials to any individual who:

(1) is under twenty-one years of age;

(2) has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(3) is under indictment for a crime punishable by imprisonment for a term exceeding one year;

(4) is a fugitive from justice;

(5) is an unlawful user of marihuana (as defined in section 4761 of the Internal Revenue Code of 1954) or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4721(a) [1] of the Internal Revenue Code of 1954); or

(6) has been adjudicated a mental defective.

(e) It shall be unlawful for any licensee knowingly to distribute any explosive materials to any person in any State where the purchase, possession, or use by such person of such explosive materials would be in violation of any State law or any published ordinance applicable at the place of distribution.

(f) It shall be unlawful for any licensee or permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without making such records as the Secretary may by regulation require, including, but not limited to, a statement of intended use, the name, date, place of birth, social security number or taxpayer identification number, and place of residence of any natural person to whom explosive materials are distributed. If explosive materials are distributed to a corporation or other business entity, such records shall include the identity and principal and local places of business and the name, date, place of birth, and place of residence of the natural person acting as agent of the corporation or other business entity in arranging the distribution.

(g) It shall be unlawful for any licensee or permittee knowingly to make any false entry in any record which he is required to keep pursuant to this section or regulations promulgated under section 847 of this title.

(h) It shall be unlawful for any person to receive, conceal, transport, ship, store, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such explosive materials were stolen.

(i) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana (as defined in section 4761 of the Internal Revenue Code of 1954) or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any explosive in interstate or foreign commerce or to receive any explosive which has been shipped or transported in interstate or foreign commerce.

(j) It shall be unlawful for any person to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary. In promulgating such regulations, the Secretary shall take into consideration the class, type, and quantity of explosive materials to be stored, as well as the standards of safety and security recognized in the explosives industry.

(k) It shall be unlawful for any person who has knowledge of the theft or loss of any explosive materials from his stock, to fail to report such theft or loss within twenty-four hours of discovery thereof, to the Secretary and to appropriate local authorities.

(Added Pub.L. 91-452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 953.)

[1] So in original. Probably should be section 4731(a).

References in Text. Section 4761 of the Internal Revenue Code of 1954, referred to in subsecs. (d)(5) and (i)(3), was repealed.

Section 201(v) of the Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (d)(5) and (i)(3), was repealed.

Section 4721(a) of the Internal Revenue Code of 1954, referred to in subsec. (d)(5), means section 4731(a) of such Code, which was repealed.

Section 4731(a) of the Internal Revenue Code of 1954, referred to in subsec. (i)(3), was repealed.

§ 843. Licenses and user permits

(a) An application for a user permit or a license to import, manufacture, or deal in explosive materials shall be in such form and contain such information as the Secretary shall by regulation prescribe. Each applicant for a license or permit shall pay a fee to be charged as set by the Secretary, said fee not to exceed $200 for each license or permit. Each license or permit shall be valid for no longer than three years from date of issuance and shall be renewable upon the same conditions and subject to the same restrictions as the original license or permit and upon payment of a renewal fee not to exceed one-half of the original fee.

(b) Upon the filing of a proper application and payment of the prescribed fee, and subject to the provisions of this chapter and other applicable laws, the Secretary shall issue to such applicant the appropriate license or permit if—

(1) the applicant (including in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not a person to whom the distribution of explosive materials would be unlawful under section 842(d) of this chapter;

(2) the applicant has not willfully violated any of the provisions of this chapter or regulations issued hereunder;

(3) the applicant has in a State premises from which he conducts or intends to conduct business;

(4) the applicant has a place of storage for explosive materials which meets such standards of public safety and security against theft as the Secretary by regulations shall prescribe; and

(5) the applicant has demonstrated and certified in writing that he is familiar with all published State laws and local ordinances relating to explosive materials for the location in which he intends to do business.

(c) The Secretary shall approve or deny an application within a period of forty-five days beginning on the date such application is received by the Secretary.

(d) The Secretary may revoke any license or permit issued under this section if in the opinion of the Secretary the holder thereof has violated any provision of this chapter or any rule or regulation prescribed by the Secretary under this chapter, or has become ineligible to acquire explosive materials under section 842(d). The Secretary's action under this subsection may be reviewed only as provided in subsection (e)(2) of this section.

(e) (1) Any person whose application is denied or whose license or permit is revoked shall receive a written notice from the Secretary stating the specific grounds upon which such denial or revocation is based. Any notice of a revocation of a license or permit shall be given to the holder of such license or permit prior to or concurrently with the effective date of the revocation.

(2) If the Secretary denies an application for, or revokes a license, or permit, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation. In the case of a revocation, the Secretary may upon a request of the holder stay the effective date of the revocation. A hearing under this section shall be at a location convenient to the aggrieved party. The Secretary shall give written notice of his decision to the aggrieved party within a reasonable time after the hearing. The aggrieved party may, within sixty days after receipt of the Secretary's written decision, file a petition with the United States court of appeals for the district in which he resides or has his principal place of business for a judicial review of such denial or revocation, pursuant to sections 701–706 of title 5, United States Code.

(f) Licensees and permittees shall make available for inspection at all reasonable times their records kept pursuant to this chapter or the regulations issued hereunder, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any licensee or permittee, for the purpose of inspecting or examining (1) any records or documents required to be kept by such licensee or permittee, under the provisions of this chapter or regulations issued hereunder, and (2) any explosive materials kept or stored by such licensee or permittee at such premises. Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received explosive materials, together with a description of such explosive materials.

(g) Licenses and permits issued under the provisions of subsection (b) of this section shall be kept posted and kept available for inspection on the premises covered by the license and permit.

(Added Pub.L. 91–452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 955.)

Transfer of Functions. For transfer of certain enforcement functions of Secretary or other official in Department of Treasury under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, see sections 102(g) and 203(a) of Reorg. Plan No. 1 of 1979, set out under section 719e of Title 15, U.S.C.A., Commerce and Trade.

Continuation in Business or Operation of Any Person Engaged in Business or Operation on October 15, 1970. See section 1105(c) of Pub.L. 91–452, set out as a note under section 841 of this title.

§ 844. Penalties

(a) Any person who violates subsections (a) through (i) of section 842 of this chapter shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) Any person who violates any other provision of section 842 of this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Any explosive materials involved or used or intended to be used in any violation of the provisions of this chapter or any other rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,[1] shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than five years or fined not more than $5,000, or both.

(f) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(g) Whoever possesses an explosive in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building, shall be imprisoned for not more than one year, or fined not more than $1,000, or both.

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years, and, notwithstanding any other provision of law, the

court shall not suspend the sentence of such person or give him a probationary sentence.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

(Added Pub.L. 91–452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 956, and amended Pub.L. 97–298, § 2, Oct. 12, 1982, 96 Stat. 1319; Pub.L. 98–473, Title II, § 1014, Oct. 12, 1984, 98 Stat. 2142.)

[1] So in original. Directory language of Pub.L. 98–473 resulted in two commas.

§ 845. Exceptions; relief from disabilities

(a) Except in the case of subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, this chapter shall not apply to:

(1) any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof;

(2) the use of explosive materials in medicines and medicinal agents in the forms prescribed by the official United States Pharmacopeia, or the National Formulary;

(3) the transportation, shipment, receipt, or importation of explosive materials for delivery to any agency of the United States or to any State or political subdivision thereof;

(4) small arms ammunition and components thereof;

(5) commercially manufactured black powder in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers, intended to be used solely for sporting, recreational, or cultural purposes in antique firearms as defined in section 921(a)(16) of title 18 of the United States Code, or in antique devices as exempted from the term "destructive device" in section 921(a)(4) of title 18 of the United States Code; and

(6) the manufacture under the regulation of the military department of the United States of explosive materials for, or their distribution to or storage or possession by the military or naval services or other agencies of the United States; or to arsenals, navy yards, depots, or other establishments owned by, or operated by or on behalf of, the United States.

(b) A person who had been indicted for or convicted of a crime punishable by imprisonment for a term exceeding one year may make application to the Secretary for relief from the disabilities imposed by this chapter with respect to engaging in the business of importing, manufacturing, or dealing in explosive materials, or the purchase of explosive materials, and incurred by reason of such indictment or conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the indictment or conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest. A licensee or permittee who makes application for relief from the disabilities incurred under this chapter by reason of indictment or conviction, shall not be barred by such indictment or conviction from further operations under his license or permit pending final action on an application for relief filed pursuant to this section.

(Added Pub.L. 91–452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 958, and amended Pub.L. 93–639, § 101, Jan. 4, 1975, 88 Stat. 2217.)

§ 846. Additional powers of the Secretary

The Secretary is authorized to inspect the site of any accident, or fire, in which there is reason to believe that explosive materials were involved, in order that if any such incident has been brought about by accidental means, precautions may be taken to prevent similar accidents from occurring.

In order to carry out the purpose of this subsection, the Secretary is authorized to enter into or upon any property where explosive materials have been used, are suspected of having been used, or have been found in an otherwise unauthorized location. Nothing in this chapter shall be construed as modifying or otherwise affecting in any way the investigative authority of any other Federal agency. In addition to any other investigatory authority they have with respect to violations of provisions of this chapter, the Attorney General and the Federal Bureau of Investigation, together with the Secretary, shall have authority to conduct investigations with respect to violations of subsection (d), (e), (f), (g), (h), or (i) of section 844 of this title.

(Added Pub.L. 91–452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 959.)

Transfer of Functions. For transfer of certain enforcement functions of Secretary or other official in Department of Treasury under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, see sections 102(g) and 203(a) of Reorg. Plan No. 1 of 1979, set out under section 719e of Title 15, U.S.C.A., Commerce and Trade.

§ 847. Rules and regulations

The administration of this chapter shall be vested in the Secretary. The Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter. The Secretary shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing such rules and regulations.

(Added Pub.L. 91–452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 959.)

Transfer of Functions. For transfer of certain enforcement functions of Secretary or other official in Department of Treasury under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, see sections 102(g) and 203(a) of Reorg. Plan No. 1 of 1979, set out under section 719e of Title 15, U.S.C.A., Commerce and Trade.

§ 848. Effect on State law

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

(Added Pub.L. 91–452, Title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 959.)

CHAPTER 41—EXTORTION AND THREATS

Sec.
871. Threats against President and successors to the Presidency.
872. Extortion by officers or employees of the United States.
873. Blackmail.
874. Kickbacks from public works employees.
875. Interstate communications.
876. Mailing threatening communications.
877. Mailing threatening communications from foreign country.
878. Threats and extortion against foreign officials, official guests, or internationally protected persons.
879. Threats against former Presidents and certain other persons protected by the Secret Service.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 871. Threats against President and successors to the Presidency

(a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(b) The terms "President-elect" and "Vice President-elect" as used in this section shall mean such persons as are the apparent successful candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2. The phrase "other officer next in the order of succession to the office of President" as used in this section shall mean the person next in the order of succession to act as President in accordance with title 3, United States Code, sections 19 and 20.

(As amended June 1, 1955, c. 115, § 1, 69 Stat. 80; Oct. 15, 1962, Pub.L. 87–829, § 1, 76 Stat. 956; Oct. 12, 1982, Pub.L. 97–297, § 2, 96 Stat. 1318.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 89 (Feb. 14, 1917, ch. 64, 39 Stat. 919).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes were made in phraseology.

§ 872. Extortion by officers or employees of the United States

Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than $5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

(As amended Oct. 31, 1951, c. 655, § 24(b), 65 Stat. 720.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 171 (Mar. 4, 1909, ch. 321, § 85, 35 Stat. 1104).

Words "or any department or agency" were inserted to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

The punishment provided by section 171 of title 18, U.S.C., 1940 ed., of fine of not more than $500 or imprisonment of not more than 1 year, or both, was increased for offenses involving more than $100 to conform to Congressional policy reflected in later Acts. See section 4047(e)(1) of title 26, U.S.C., 1940 ed., Internal Revenue Code, and the punishment provision following paragraph (10) of said subsection.

§ 873. Blackmail

Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based upon title 18, U.S.C., 1940 ed., § 250 (Mar. 4, 1909, ch. 321, § 145, 35 Stat. 1114).

Only minor changes were made in phraseology.

§ 874. Kickbacks from public works employees

Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on section 276b of title 40, U.S.C., 1940 ed., Public Buildings, Property, and Works (June 13, 1934, ch. 482, § 1, 48 Stat. 948).

Slight changes of phraseology were made.

§ 875. Interstate communications

(a) Whoever transmits in interstate commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 408d (May 18, 1934, ch. 300, 48 Stat. 781; May 15, 1939, ch. 133, § 2, 53 Stat. 743).

Provisions as to district of trial were omitted as covered by sections 3237 and 3239 of this title.

Definition of "interstate commerce" was omitted in conformity with definitive section 10 of this title.

Changes were made in phraseology and arrangement.

§ 876. Mailing threatening communications

Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly caus-

es to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnaped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(7), 84 Stat. 777.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 338a (July 8, 1932, ch. 464, § 1, 47 Stat. 649; June 28, 1935, ch. 326, 49 Stat. 427; May 15, 1939, ch. 133, § 1, 53 Stat. 742).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Provisions as to district of trial were omitted as covered by sections 3237 and 3239 of this title.

Changes in phraseology and arrangement were made.

§ 877. Mailing threatening communications from foreign country

Whoever knowingly deposits in any post office or authorized depository for mail matter of any foreign country any communication addressed to any person within the United States, for the purpose of having such communication delivered by the post office establishment of such foreign country to the Postal Service and by it delivered to such addressee in the United States, and as a result thereof such communication is delivered by the post office establishment of such foreign country to the Postal Service and by it delivered to the address to which it is directed in the United States, and containing any demand or request for ransom or reward for the release of any kidnaped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever, with intent to extort from any person any money or other thing of value, so deposits as aforesaid, any communication for the purpose aforesaid, containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever knowingly so deposits as aforesaid, any communication, for the purpose aforesaid, containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits as aforesaid, any communication, for the purpose aforesaid, containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(8), 84 Stat. 777.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 338b (July 8, 1932, ch. 464, § 2, 47 Stat. 649; May 15, 1939, ch. 133, § 1, 53 Stat. 742).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Provisions as to district of trial were omitted as covered by sections 3237 and 3239 of this title.

§ 878. Threats and extortion against foreign officials, official guests, or internationally protected persons

(a) Whoever knowingly and willfully threatens to violate section 112, 1116, or 1201 by killing, kidnapping, or assaulting a foreign official, official guest, or internationally protected person shall be fined not more than $5,000 or imprisoned not more than five years, or both, except that imprisonment for a threatened assault shall not exceed three years.

(b) Whoever in connection with any violation of subsection (a) or actual violation of section 112, 1116, or 1201 makes any extortionate demand shall be fined not more than $20,000 or imprisoned not more than twenty years, or both.

(c) For the purpose of this section "foreign official", "internationally protected person", and "official guest" shall have the same meanings as those provided in section 1116(a) of this title.

(d) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(38)).

(Added Pub.L. 94–467, § 8, Oct. 8, 1976, 90 Stat. 2000, and amended Pub.L. 95–163, § 17(b)(1), Nov. 9, 1977, 91 Stat. 1286; Pub.L. 95–504, § 2(b), Oct. 24, 1978, 92 Stat. 1705.)

§ 879. Threats against former Presidents and certain other persons protected by the Secret Service

(a) Whoever knowingly and willfully threatens to kill, kidnap, or inflict bodily harm upon—

(1) a former President or a member of the immediate family of a former President;

(2) a member of the immediate family of the President, the President-elect, the Vice President, or the Vice President-elect; or

(3) a major candidate for the office of President or Vice President, or the spouse of such candidate;

who is protected by the Secret Service as provided by law, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

(b) As used in this section—

(1) the term "immediate family" means—

(A) with respect to subsection (a)(1) of this section, the wife of a former President during his lifetime, the widow of a former President until her death or remarriage, and minor children of a former President until they reach sixteen years of age; and

(B) with respect to subsection (a)(2) of this section, a person to whom the President, President-elect, Vice President, or Vice President-elect—

(i) is related by blood, marriage, or adoption; or

(ii) stands in loco parentis;

(2) the term "major candidate for the office of President or Vice President" means a candidate referred to in subsection (a)(7) of section 3056 of this title; and

(3) the terms "President-elect" and "Vice President-elect" have the meanings given those terms in section 871(b) of this title.

(Added Pub.L. 97–297, § 1(a), Oct. 12, 1982, 96 Stat. 1317, and amended Pub.L. 98–587, § 3(a), Oct. 30, 1984, 98 Stat. 3111.)

References in Text. The Joint resolution to authorize the United States Secret Service to furnish protection to major Presidential or Vice Presidential candidates, approved June 6, 1968, referred to in subsec. (b)(2), is Pub.L. 90–331, June 6, 1968, 82 Stat. 170, which is set out as a note under section 3056 of this title.

CHAPTER 42—EXTORTIONATE CREDIT TRANSACTIONS

Sec.
891. Definitions and rules of construction.
892. Making extortionate extensions of credit.
893. Financing extortionate extensions of credit.
894. Collection of extensions of credit by extortionate means.
[895. Repealed.]
896. Effect on State laws.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 891. Definitions and rules of construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge

in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

(Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 159.)

Congressional Findings and Declaration of Purpose. Section 201 of Pub.L. 90–321 provided that:

"(a) The Congress makes the following findings:

"(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

"(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

"(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

"(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

"(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United States Code [this chapter] are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy."

Annual Report to Congress by Attorney General. Section 203 of Pub.L. 90–321, which had directed the Attorney General to make an annual report to Congress of the activities of the Department of Justice in the enforcement of this chapter, was repealed by Pub.L. 97–375, Title I, § 109(b), Dec. 21, 1982, 96 Stat. 1820.

§ 892. Making extortionate extensions of credit

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

(Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 160.)

§ 893. Financing extortionate extensions of credit

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

(Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.)

§ 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

(Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.)

[§ 895. Repealed. Pub.L. 91–452, Title II, § 223(a), Oct. 15, 1970, 84 Stat. 929]

Savings Provision. Repeal of section not to affect any immunity to which any individual was entitled under such section by reason of any testimony given before the sixtieth day following Oct. 15, 1970.

§ 896. Effect on State laws

This chapter does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter. No law of any State which would be valid in the absence of this chapter may be held invalid or inapplicable by virtue of the existence of this chapter, and no officer, agency, or instrumentality of any State may be deprived by virtue of this chapter of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter.

(Added Pub.L. 90–321, Title II, § 202(a), May 29, 1968, 82 Stat. 162.)

CHAPTER 43—FALSE PERSONATION

Sec.

911. Citizen of the United States.
912. Officer or employee of the United States.
913. Impersonator making arrest or search.
914. Creditors of the United States.
915. Foreign diplomats, consuls or officers.
916. 4–H Club members or agents.
917. Red Cross members or agents.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984,

98 Stat. 2031, set out as a note under section 3551 of this title.

§ 911. Citizen of the United States

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on subsection (a), paragraph (18) and subsection (d), of section 746, title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a), par. (18), and (d), 54 Stat. 1165, 1167).

Section consolidates said provisions of section 746, title 8, U.S.C., 1940 ed., Aliens and Nationality. The word "willfully" was substituted for "knowingly", "$1,000" for "$5,000", and "three years" for "five years", to harmonize with congressional intent evidenced by the other sections of this chapter.

Minor changes were made in phraseology and unnecessary words were omitted.

§ 912. Officer or employee of the United States

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 76 and 123 (Mar. 4, 1909, ch. 321, §§ 32 and 66, 35 Stat. 1095, 1100; Feb. 28, 1938, ch. 37, 52 Stat. 82).

Section consolidates sections 76 and 123 of title 18, U.S.C., 1940 ed. The effect of this consolidation was to increase the punishment for revenue officers from $500 to $1,000 and from 2 years to 3 years, and to rephrase in the alternative the mandatory punishment provision.

This section now applies the same punishment to all officers and agents of the United States found guilty of false personation.

Words "agency or" were inserted to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.) Other words referring to "authority of any corporation owned or controlled by the United States" were omitted for the same reason. (See *Pierce* v. *U.S.*, 1941, 62 S.Ct. 237, 314 U.S. 306, 86 L.Ed. 226.)

The words "with the intent to defraud the United States or any person", contained in said section 76 of title 18, U.S.C., 1940 ed., were omitted as meaningless in view of *United States v. Lapowich*, 63 S.Ct. 914.

Changes were made in phraseology.

§ 913. Impersonator making arrest or search

Whoever falsely represents himself to be an officer, agent, or employee of the United States, and in such assumed character arrests or detains any person or in any manner searches the person, buildings, or other property of any person, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 77a (Aug. 27, 1935, ch. 740, § 201, 49 Stat. 877).

Words "shall be deemed guilty of a misdemeanor" were omitted. (See definitive section 1 of this title.) Words "and upon conviction thereof" preceding "shall be" were omitted as surplusage since punishment cannot be imposed until conviction is secured.

Maximum imprisonment provision was changed from 1 year to 3 years so as to be consistent with sections 911 and 912 of this title, the latter having also been changed to 3 years. There is no sound reason why a uniform punishment should not be prescribed for the offenses defined in these three sections.

Changes were made in phraseology.

§ 914. Creditors of the United States

Whoever falsely personates any true and lawful holder of any share or sum in the public stocks or debt of the United States, or any person entitled to any annuity, dividend, pension, wages, or other debt due from the United States, and, under color of such false personation, transfers or endeavors to transfer such public stock or any part thereof, or receives or endeavors to receive the money of such true and lawful holder thereof, or the money of any person really entitled to receive such annuity, dividend, pension, wages, or other debt, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 78 (Mar. 4, 1909, ch. 321, § 33, 35 Stat. 1095).

Words "prize money" after "pension" were deleted as repealed by act Mar. 3, 1899, ch. 413, 30 Stat. 1007, repealing all laws authorizing prize money distribution.

Mandatory punishment was rephrased in the alternative.

In the punishment provision the words "five years" were substituted for "ten years" to harmonize it with the punishment provisions in sections 287 and 1001 of this title, covering similar offenses. (See reviser's note under section 287 of this title.)

§ 915. Foreign diplomats, consuls or officers

Whoever, with intent to defraud within the United States, falsely assumes or pretends to be a diplomatic, consular or other official of a foreign government duly accredited as such to the United

States and acts as such, or in such pretended character, demands or obtains or attempts to obtain any money, paper, document, or other thing of value, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on section 232 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 15, 1917, ch. 30, title VIII, § 2, 40 Stat. 226; Mar. 28, 1940, ch. 72, § 6, 54 Stat. 80).

Reference to "jurisdiction" of the United States was omitted as unnecessary in view of definition of "United States" in section 5 of this title.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 916. 4–H Club members or agents

Whoever, falsely and with intent to defraud, holds himself out as or represents or pretends himself to be a member of, associated with, or an agent or representative for the 4–H clubs, an organization established by the Extension Service of the United States Department of Agriculture and the land grant colleges, shall be fined not more than $300 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 76c (June 5, 1939, ch. 184, § 1, 53 Stat. 809).

Section 76c of title 18, U.S.C., 1940 ed., was incorporated in this section and section 707 of this title.

Reference to offense as a misdemeanor was omitted in view of definitive section 1 of this title. Words "upon conviction thereof" were omitted, since criminal punishment can follow only after conviction.

Minor changes were made in phraseology.

§ 917. Red Cross members or agents

Whoever, within the United States, falsely or fraudulently holds himself out as or represents or pretends himself to be a member of or an agent for the American National Red Cross for the purpose of soliciting, collecting, or receiving money or material, shall be fined not more than $500 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on section 4 of title 36, U.S.C., 1940 ed., Patriotic Societies and Observances (Jan. 5, 1905, ch. 23, § 4, 33 Stat. 600; June 23, 1910, ch. 372, § 1, 36 Stat. 604).

Section 4 of title 36, U.S.C., 1940 ed., Patriotic Societies and Observances, was divided into this section and section 706 of this title.

Reference to "jurisdiction" of the United States was omitted as unnecessary in view of definition of "United States" in section 5 of this title.

Reference to offense as a misdemeanor was omitted in view of definitive section 1 of this title.

Words "upon conviction thereof" were omitted as punishment cannot be imposed until conviction is secured.

Minor changes were made in phraseology.

CHAPTER 44—FIREARMS

Sec.
921. Definitions.
922. Unlawful acts.
923. Licensing.
924. Penalties.
925. Exceptions: Relief from disabilities.
926. Rules and regulations.
927. Effect on State law.
928. Separability clause.[1]
929. Use of restricted ammunition.

[1] So in original. Does not conform to section catchline.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 921. Definitions

(a) As used in this chapter—

(1) The term "person" and the term "whoever" include any individual, corporation, company, association, firm, partnership, society, or joint stock company.

(2) The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

(4) The term "destructive device" means—

(A) any explosive, incendiary, or poison gas—

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordinance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

(5) The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(6) The term "short-barreled shotgun" means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than twenty-six inches.

(7) The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(8) The term "short-barreled rifle" means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches.

(9) The term "importer" means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term "licensed importer" means any such person licensed under the provisions of this chapter.

(10) The term "manufacturer" means any person engaged in the manufacture of firearms or ammunition for purposes of sale or distribution; and the term "licensed manufacturer" means any such person licensed under the provisions of this chapter.

(11) The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

(12) The term "pawnbroker" means any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm or ammunition as security for the payment or repayment of money.

(13) The term "collector" means any person who acquires, holds, or disposes of firearms or ammunition as curios or relics, as the Secretary shall by regulation define, and the term "licensed collector" means any such person licensed under the provisions of this chapter.

(14) The term "indictment" includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.

(15) The term "fugitive from justice" means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.

(16) The term "antique firearm" means—

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) any replica of any firearm described in subparagraph (A) if such replica—

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not

readily available in the ordinary channels of commercial trade.

(17) The term "ammunition" means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm.

(18) The term "Secretary" or "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

(19) The term "published ordinance" means a published law of any political subdivision of a State which the Secretary determines to be relevant to the enforcement of this chapter and which is contained on a list compiled by the Secretary, which list shall be published in the Federal Register, revised annually, and furnished to each licensee under this chapter.

(20) The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

(b) For the purposes of this chapter, a member of the Armed Forces on active duty is a resident of the State in which his permanent duty station is located.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 226, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1214; Pub.L. 93–639, § 102, Jan. 4, 1975, 88 Stat. 2217.)

Congressional Findings and Declaration of Purpose. Section 101 of Pub.L. 90–618 provided that: "The Congress hereby declares that the purposes of this title [Title I of Pub.L. 90–618 which amended this chapter] is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

Section 901 of Pub.L. 90–351 provided that:

"(a) The Congress hereby finds and declares—

"(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;

"(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapon is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

"(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible;

"(4) that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances;

"(5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms;

"(6) that there is a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior;

"(7) that the United States has become the dumping ground of the castoff surplus military weapons of other nations, and that such weapons, and the large volume of relatively inexpensive pistols and revolvers (largely worthless for sporting purposes), imported into the United States in recent years, has contributed greatly to lawlessness and to the Nation's law enforcement problems;

"(8) that the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern;

"(9) that the existing licensing system under the Federal Firearms Act [former sections 901 to 910 of Title 15, U.S.C.A., Commerce and Trade] does not provide adequate license fees or proper standards for the granting or denial of licenses, and that this has led to licenses being issued to persons not reasonably entitled

thereto, thus distorting the purposes of the licensing system.

"(b) The Congress further hereby declares that the purpose of this title [Title IX of Pub.L. 90–351 which enacted this chapter and repealing sections 901 to 910 of Title 15, U.S.C.A., Commerce and Trade] is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title [enacting this chapter and repealing sections 901 to 910 of Title 15] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title [enacting this chapter and repealing sections 901 to 910 of Title 15] is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title [enacting this chapter and repealing sections 901 to 910 of Title 15]."

Administration and Enforcement by Secretary of Treasury. Section 103 of Pub.L. 90–618 provided that: "The administration and enforcement of the amendment made by this title [Title I of Pub.L. 90–618 which amended this chapter] shall be vested in the Secretary of the Treasury."

Section 903 of Pub.L. 90–351 provided that: "The administration and enforcement of the amendment made by this title [Title IX of Pub.L. 90–351 which enacted this chapter and provisions set out as notes under this section] shall be vested in the Secretary of the Treasury."

Modification of Other Laws. Section 104 of Pub.L. 90–618 provided that:

"Nothing in this title [Title I of Pub.L. 90–618] or the amendment made thereby [amending this chapter] shall be construed as modifying or affecting any provision of—

"(a) the National Firearms Act (chapter 53 of the Internal Revenue Code of 1954) [section 5801 et seq. of Title 26, U.S.C.A., Internal Revenue Code];

"(b) section 414 of the Mutual Security Act of 1954 (22 U.S.C. 1934), as amended, relating to munitions control; or

"(c) section 1715 of title 18, United States Code, relating to nonmailable firearms."

Section 904 of Pub.L. 90–351 provided that:

"Nothing in this title [Title IX of Pub.L. 90–351] or amendment made thereby [enacting this chapter and provisions set out as notes under this section] shall be construed as modifying or affecting any provision of—

"(a) the National Firearms Act (chapter 53 of the Internal Revenue Code of 1954) [section 5801 et seq. of Title 26, U.S.C.A., Internal Revenue Code]; or

"(b) section 414 of the Mutual Security Act of 1954 (22 U.S.C. 1934), as amended, relating to munitions control; or

"(c) section 1715 of title 18, United States Code, relating to nonmailable firearms."

§ 922. Unlawful acts

(a) It shall be unlawful—

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm or ammunition to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that—

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, or licensed dealer for the sole purpose of repair or customizing;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of

residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe resides in any State other than that in which the transferor resides (or other than that in which its place of business is located if the transferor is a corporation or other business entity); except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes; and

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm or ammunition to any person in any State where the purchase or possession by such person of such firearm or ammunition would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of a rifle or shotgun to a resident of a State contiguous to the State in which the licensee's place of business is located if the purchaser's State of residence permits such sale or delivery by law, the sale fully complies with the legal conditions of sale in both such contiguous States, and the purchaser and the licensee have, prior to the sale, or delivery for sale, of the rifle or shotgun, complied with all of the requirements of section 922(c) applicable to intrastate transactions other than at the licensee's business premises, (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes, and (C) shall not preclude any person who is participating in any organized rifle or shotgun match or contest, or is engaged in hunting, in a State other than his State of residence and whose rifle or shotgun has been lost or stolen or has become inoperative in such other State, from purchasing a rifle or shotgun in such other State from a licensed dealer if such person presents to such dealer a sworn statement (i) that his rifle or shotgun was lost or stolen or became inoperative while participating in such a match or contest, or while engaged in hunting, in such other State, and (ii) identifying the chief law enforcement officer of the locality in which such person resides, to whom such licensed dealer shall forward such statement by registered mail;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

(5) any firearm or ammunition except .22 caliber rimfire ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are _____

_____

Signature _____ Date _____."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) has been adjudicated as a mental defective or has been committed to any mental institution.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

(f) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(g) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any firearm or ammunition in interstate or foreign commerce.

(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, or which constitutes, interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered.

(*l*) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 228, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1216; Pub.L. 97–377, Title I, § 165(a), Dec. 21, 1982, 96 Stat. 1923.)

References in Text. "The effective date of this chapter," referred to in subsec. (a)(3), is Dec. 16, 1968.

Section 201(v) of the Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (d)(3), (g)(3), was repealed.

Section 4731(a) of the Internal Revenue Code of 1954, referred to in subsecs. (d)(3), (g)(3), (h)(3), was repealed.

Change of Name. The Post Office Department has been redesignated the United States Postal Service.

§ 923. Licensing

(a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows:

(1) If the applicant is a manufacturer—

(A) of destructive devices or ammunition for destructive devices, a fee of $1,000 per year;

(B) of firearms other than destructive devices, a fee of $50 per year; or

(C) of ammunition for firearms other than destructive devices, a fee of $10 per year.

(2) If the applicant is an importer—

(A) of destructive devices or ammunition for destructive devices, a fee of $1,000 per year; or

(B) of firearms other than destructive devices or ammunition for firearms other than destructive devices, a fee of $50 per year.

(3) If the applicant is a dealer—

(A) in destructive devices or ammunition for destructive devices, a fee of $1,000 per year;

(B) who is a pawnbroker dealing in firearms other than destructive devices or ammunition for firearms other than destructive devices, a fee of $25 per year; or

(C) who is not a dealer in destructive devices or a pawnbroker, a fee of $10 per year.

(b) Any person desiring to be licensed as a collector shall file an application for such license with the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. The fee for such license shall be $10 per year. Any license granted under this subsection shall only apply to transactions in curios and relics.

(c) Upon the filing of a proper application and payment of the prescribed fee, the Secretary shall issue to a qualified applicant the appropriate license which, subject to the provisions of this chapter and other applicable provisions of law, shall entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce during the period stated in the license.

(d) (1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

(A) the applicant is twenty-one years of age or over;

(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) and (h) of this chapter;

(C) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;

(D) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application; and

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time, or (ii) in the case of a collector, premises from which he conducts his collecting subject to license under this chapter or from which he intends to conduct such collecting within a reasonable period of time.

(2) The Secretary must approve or deny an application for a license within the forty-five-day period beginning on the date it is received. If the Secretary fails to act within such period, the applicant may file an action under section 1361 of title 28 to compel the Secretary to act. If the Secretary approves an applicant's application, such applicant shall be issued a license upon the payment of the prescribed fee.

(e) The Secretary may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has violated any provision of this chapter or any rule or regulation prescribed by the Secretary under this chapter. The Secretary's action under this subsection may be reviewed only as provided in subsection (f) of this section.

(f) (1) Any person whose application for a license is denied and any holder of a license which is revoked shall receive a written notice from the Secretary stating specifically the grounds upon which the application was denied or upon which the license was revoked. Any notice of a revocation of a license shall be given to the holder of such license before the effective date of the revocation.

(2) If the Secretary denies an application for, or revokes, a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation. In the case of a revocation of a license, the Secretary shall upon the request of the holder of the license stay the effective date of the revocation. A hearing held under this paragraph shall be held at a location convenient to the aggrieved party.

(3) If after a hearing held under paragraph (2) the Secretary decides not to reverse his decision to deny an application or revoke a license, the Secretary shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding. If the court decides that the Secretary was not authorized to deny the application or to revoke the license, the court shall order the Secretary to take such action as may be necessary to comply with the judgment of the court.

(g) Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition except .22 caliber rimfire ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such importers, manufacturers, dealers, and collectors shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises. Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition.

(h) Licenses issued under the provisions of subsection (c) of this section shall be kept posted and kept available for inspection on the premises covered by the license.

(i) Licensed importers and licensed manufacturers shall identify, by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Secretary shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.

(j) This section shall not apply to anyone who engages only in hand loading, reloading, or custom loading ammunition for his own firearm, and who does not hand load, reload, or custom load ammunition for others.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 231, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1221; Pub.L. 97–377, Title I, § 165(b), Dec. 21, 1982, 96 Stat. 1923.)

§ 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

(c) Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(d) Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 233, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1223; Pub.L. 91–644, Title II, § 13, Jan. 2, 1971, 84 Stat. 1889; Pub.L. 98–473, Title II, § 1005(a), Oct. 12, 1984, 98 Stat. 2138.)

Amendment of Subsec. (a)

Section 223(a) of Pub.L. 98-473, Oct. 12, 1984, 98 Stat. 2028, amended subsec. (a) of this section by deleting ", and shall become eligible for parole as the Board of Parole shall determine" effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 925. Exceptions: Relief from disabilities

(a) (1) The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

(2) The provisions of this chapter shall not apply with respect to (A) the shipment or receipt of firearms or ammunition when sold or issued by the Secretary of the Army pursuant to section 4308 of title 10, and (B) the transportation of any such firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions.

(3) Unless otherwise prohibited by this chapter or any other Federal law, a licensed importer, licensed manufacturer, or licensed dealer may ship to a member of the United States Armed Forces on active duty outside the United States or to clubs, recognized by the Department of Defense, whose entire membership is composed of such members, and such members or clubs may receive a firearm or ammunition determined by the Secretary of the Treasury to be generally recognized as particularly suitable for sporting purposes and intended for the personal use of such member or club.

(4) When established to the satisfaction of the Secretary to be consistent with the provisions of this chapter and other applicable Federal and State laws and published ordinances, the Secretary may authorize the transportation, shipment, receipt, or importation into the United States to the place of residence of any member of the United States Armed Forces who is on active duty outside the United States (or who has been on active duty outside the United States within the sixty day period immediately preceding the transportation, shipment, receipt, or importation), of any firearm or ammunition which is (A) determined by the Secretary to be generally recognized as particularly suitable for sporting purposes, or determined by the Department of Defense to be a type of firearm normally classified as a war souvenir, and (B) intended for the personal use of such member.

(5) For the purpose of paragraphs (3) and (4) of this subsection, the term "United States" means each of the several States and the District of Columbia.

(b) A licensed importer, licensed manufacturer, licensed dealer, or licensed collector who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license (if prior to the expiration of the term of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

(c) A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

(d) The Secretary may authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the person importing or bringing in the firearm or ammunition establishes to the satisfaction of the Secretary that the firearm or ammunition—

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

(2) is an unserviceable firearm, other than a machinegun as defined in section 5845(b) of the Internal Revenue Code of 1954 (not readily restorable to firing condition), imported or brought in as a curio or museum piece;

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms; or

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition.

The Secretary may permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.

(e) Notwithstanding any other provision of this title, the Secretary shall authorize the importation of, by any licensed importer, the following:

(1) All rifles and shotguns listed as curios or relics by the Secretary pursuant to section 921(a)(13), and

(2) All handguns, listed as curios or relics by the Secretary pursuant to section 921(a)(13), provided that such handguns are generally recognized as particularly suitable for or readily adaptable to sporting purposes.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 233, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1224; Pub.L. 98–573, Title II, § 233, Oct. 30, 1984, 98 Stat. 2991.)

References in Text. The National Firearms Act, referred to in subsec. (c), is classified generally to section 5801 et seq. of Title 26, U.S.C.A., Internal Revenue Code.

§ 926. Rules and regulations

The Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter, including—

(1) regulations providing that a person licensed under this chapter, when dealing with another person so licensed, shall provide such other licensed person a certified copy of this license; and

(2) regulations providing for the issuance, at a reasonable cost, to a person licensed under this chapter, of certified copies of his license for use as provided under regulations issued under paragraph (1) of this subsection.

The Secretary shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing such rules and regulations.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 234, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1226.)

§ 927. Effect on State law

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 234, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1226.)

§ 928. Separability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

(Added Pub.L. 90–351, Title IV, § 902, June 19, 1968, 82 Stat. 234, and amended Pub.L. 90–618, Title I, § 102, Oct. 22, 1968, 82 Stat. 1226.)

§ 929. Use of restricted ammunition

(a) Whoever, during and in relation to the commission of a crime of violence including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device for which he may be prosecuted in a court of the United States, uses or carries any handgun loaded with armor-piercing ammunition as defined in subsection (b), shall, in addition to the punishment provided for the commission of such crime of violence be sentenced to a term of imprisonment for not less than five nor more than ten years. Notwithstanding any other provision of law, the court shall not suspend the sentence of any person convicted of a violation of this subsection, nor place him on probation, nor shall the term of imprisonment run concurrently with any other terms of imprisonment including that imposed for the felony in which the armor-piercing handgun ammunition was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(b) For purposes of this section—

(1) "armor-piercing ammunition" means ammunition which, when fired or if fired from any handgun used or carried in violation of subsection (a) under the test procedure of the National Institute of Law Enforcement and Criminal Justice Standard for the Ballistics Resistance of Police Body Armor promulgated December 1978, is determined to be capable of penetrating bullet-resistant apparel or body armor meeting the re-

quirements of Type IIA of Standard NILECJ-STD-0101.01 as formulated by the United States Department of Justice and published in December of 1978; and

(2) "handgun" means any firearm, including a pistol or revolver, originally designed to be fired by the use of a single hand.

(Added Pub.L. 98-473, Title II, § 1006(a), Oct. 12, 1984, 98 Stat. 2139.)

CHAPTER 45—FOREIGN RELATIONS

Sec.
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[1] Act Aug. 26, 1954, c. 937, title V, § 542(a)(14), 68 Stat. 861, which repealed section 968 of this title, did not amend analysis to reflect the repeal.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 951. Agents of foreign governments

(a) Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be fined not more than $75,000 or imprisoned not more than ten years, or both.

(b) The Attorney General shall promulgate rules and regulations establishing requirements for notification.

(c) The Attorney General shall, upon receipt, promptly transmit one copy of each notification statement filed under this section to the Secretary of State for such comment and use as the Secretary of State may determine to be appropriate from the point of view of the foreign relations of the United States. Failure of the Attorney General to do so shall not be a bar to prosecution under this section.

(d) For purposes of this section, the term "agent of a foreign government" means an individual who agrees to operate within the United States subject to the direction or control of a foreign government or official, except that such term does not include—

(1) a duly accredited diplomatic or consular officer of a foreign government, who is so recognized by the Department of State;

(2) any officially and publicly acknowledged and sponsored official or representative of a foreign government;

(3) any officially and publicly acknowledged and sponsored member of the staff of, or employee of, an officer, official, or representative described in paragraph (1) or (2), who is not a United States citizen; or

(4) any person engaged in a legal commercial transaction.

(As amended Jan. 12, 1983, Pub.L. 97-462, § 6, 96 Stat. 2530; Oct. 12, 1984, Pub.L. 98-473, Title II, § 1209, 98 Stat. 2164.)

Historical and Revision Notes

Based on section 601 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 15, 1917, ch. 30, title VIII, § 3, 40 Stat. 226; Mar. 28, 1940, ch. 72, § 6, 54 Stat. 80).

Mandatory punishment provision was rephrased in the alternative.

Minor changes in phraseology were made.

Effective Date of 1983 Amendment. Amendment by Pub.L. 97-462, increasing fines to $75,000 from $5,000, 45 days after Jan. 12, 1983, pursuant to section 4 of Pub.L. 97-462.

§ 952. Diplomatic codes and correspondence

Whoever, by virtue of his employment by the United States, obtains from another or has or has had custody of or access to, any official diplomatic code or any matter prepared in any such code, or which purports to have been prepared in any such code, and without authorization or competent authority, willfully publishes or furnishes to another any such code or matter, or any matter which was obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States, shall be fined not

more than $10,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on section 135 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 10, 1933, ch. 57, 48 Stat. 122).

Minor changes of phraseology were made.

§ 953. Private correspondence with foreign governments

Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

HISTORICAL AND REVISION NOTES

Based on title 18 U.S.C., 1940 ed., § 5 (Mar. 4, 1909, ch. 321, § 5, 35 Stat. 1088; Apr. 22, 1932, ch. 126, 47 Stat. 132).

The reference to any citizen or resident within the jurisdiction of the United States not duly authorized "who counsels, advises or assists in such correspondence with such intent" was omitted as unnecessary in view of definition of principal in section 2.

Mandatory punishment provision was rephrased in the alternative.

Minor changes of arrangement and in phraseology were made.

§ 954. False statements influencing foreign government

Whoever, in relation to any dispute or controversy between a foreign government and the United States, willfully and knowingly makes any untrue statement, either orally or in writing, under oath before any person authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the United States or any department or agency thereof, to the injury of the United States, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on section 231 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 15, 1917, ch. 30, title VIII, § 1, 40 Stat. 226; Mar. 28, 1940, ch. 72, § 6, 54 Stat. 80).

Mandatory punishment provision was rephrased in the alternative.

Words "department or agency" were added to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

Minor changes were made in phraseology.

§ 955. Financial transactions with foreign governments

Whoever, within the United States, purchases or sells the bonds, securities, or other obligations of any foreign government or political subdivision thereof or any organization or association acting for or on behalf of a foreign government or political subdivision thereof, issued after April 13, 1934, or makes any loan to such foreign government, political subdivision, organization or association, except a renewal or adjustment of existing indebtedness, while such government, political subdivision, organization or association, is in default in the payment of its obligations, or any part thereof, to the United States, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

This section is applicable to individuals, partnerships, corporations, or associations other than public corporations created by or pursuant to special authorizations of Congress, or corporations in which the United States has or exercises a controlling interest through stock ownership or otherwise. While any foreign government is a member both of the International Monetary Fund and of the International Bank for Reconstruction and Development, this section shall not apply to the sale or purchase of bonds, securities, or other obligations of such government or any political subdivision thereof or of any organization or association acting for or on behalf of such government or political subdivision, or to making of any loan to such government, political subdivision, organization, or association.

HISTORICAL AND REVISION NOTES

Based on section 804a of title 31, U.S.C., 1940 ed., Money and Finance (Apr. 13, 1934, ch. 112, §§ 1, 2, 48 Stat. 574).

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Words "upon conviction thereof" were omitted from first paragraph as surplusage since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

§ 956. Conspiracy to injure property of foreign government

(a) If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(b) Any indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy.

Historical and Revision Notes

Based on section 234 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 15, 1917, ch. 30, title VIII, § 5, 40 Stat. 226).

§ 957. Possession of property in aid of foreign government

Whoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed. § 98 (June 15, 1917, ch. 30, title XI, § 22, 40 Stat. 230; Mar. 28, 1940, ch. 72, § 8, 54 Stat. 80).

Definition of "foreign government" was omitted and is incorporated in section 11 of this title.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 958. Commission to serve against friendly nation

Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, against any prince, state, colony, district, or people, with whom the United States is at peace, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 21 (Mar. 4, 1909, ch. 321, § 9, 35 Stat. 1089).

Mandatory punishment provision was rephrased in the alternative.

Minor changes in phraseology were made.

§ 959. Enlistment in foreign service

(a) Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

(b) This section shall not apply to citizens or subjects of any country engaged in war with a country with which the United States is at war, unless such citizen or subject of such foreign country shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United States with intent to enlist or enter the service of a foreign country. Enlistments under this subsection shall be under regulations prescribed by the Secretary of the Army.

(c) This section and sections 960 and 961 of this title shall not apply to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district, or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed. §§ 22, 30 (Mar. 4, 1909, ch. 321, §§ 10, 18, 35 Stat. 1089, 1091; May 7, 1917, ch. 11, 40 Stat. 39).

Section consolidates said sections of title 18, U.S.C., 1940 ed. Last sentence of section 30 of title 18, U.S.C., 1940 ed., relating to piracy and treason, was omitted as unnecessary.

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

References in subsection (c) to sections 960 and 961 of this title are to the only other sections to which the subsection can apply.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 960. Expedition against friendly nation

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 25 (Mar. 4, 1909, ch. 321, § 13, 35 Stat. 1090; June 15, 1917, ch. 30, title V, § 8, 40 Stat. 223).

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Reference to territory or possessions of the United States was omitted as covered by definitive section 5 of this title.

§ 961. Strengthening armed vessel of foreign nation

Whoever, within the United States, increases or augments the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States is at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 24 (Mar. 4, 1909, ch. 321, § 12, 35 Stat. 1090).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Mandatory punishment was rephrased in the alternative.

Words "within the United States" were substituted for "within the territory or jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Minor changes in phraseology were made.

§ 962. Arming vessel against friendly nation

Whoever, within the United States, furnishes, fits out, arms, or attempts to furnish, fit out or arm, any vessel, with intent that such vessel shall be employed in the service of any foreign prince, or state, or of any colony, district, or people, to cruise, or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace; or

Whoever issues or delivers a commission within the United States for any vessel, to the intent that she may be so employed—

Shall be fined not more than $10,000 or imprisoned not more than three years, or both.

Every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of the informer and the other half to the use of the United States.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 23 (Mar. 4, 1909, ch. 321, § 11, 35 Stat. 1090).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Mandatory punishment provision was rephrased in the alternative.

Minor change was made in phraseology.

§ 963. Detention of armed vessel

(a) During a war in which the United States is a neutral nation, the President, or any person authorized by him, may detain any armed vessel owned wholly or in part by citizens of the United States, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed

to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdiction of the United States, or upon the high seas.

(b) Whoever, in violation of this section takes, or attempts to take, or authorizes the taking of any such vessel, out of port or from the United States, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 32, 36 (June 15, 1917, ch. 30, title V, §§ 2, 6, 40 Stat. 221, 222; Mar. 28, 1940, ch. 72, § 5, 54 Stat. 79).

Section consolidates said sections of title 18, U.S.C., 1940 ed.,

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Mandatory punishment provision was rephrased in the alternative.

The conspiracy provision of said section 36 was omitted as covered by section 371 of this title. See reviser's note under that section.

Changes in phraseology were also made.

Delegation of Functions. For delegation to the Secretary of the Treasury of authority vested in the President by this section see section 1(*l*) of Ex. Ord. No. 10637, Sept. 16, 1955, 20 F.R. 7025.

§ 964. Delivering armed vessel to belligerent nation

(a) During a war in which the United States is a neutral nation, it shall be unlawful to send out of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract that such vessel will be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

(b) Whoever, in violation of this section, takes or attempts to take, or authorizes the taking of any such vessel, out of port or from the United States, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 33, 36 (June 15, 1917, ch. 30, title V, §§ 3, 6, 40 Stat. 222; Mar. 28, 1940, ch. 72, § 5, 54 Stat. 79).

Section consolidates said sections of title 18, U.S.C., 1940 ed.

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of United States in section 5 of this title.

Mandatory punishment provision was rephrased in the alternative.

The conspiracy provision of said section 36 was omitted as covered by section 371 of this title. See reviser's note under that section.

Minor changes of phraseology were made.

§ 965. Verified statements as prerequisite to vessel's departure

(a) During a war in which the United States is a neutral nation, every master or person having charge or command of any vessel, domestic or foreign, whether requiring clearance or not, before departure of such vessel from port shall, in addition to the facts required by sections 91, 92, and 94 of Title 46 to be set out in the masters' and shippers' manifests before clearance will be issued to vessels bound to foreign ports, deliver to the collector of customs for the district wherein such vessel is then located a statement, duly verified by oath, that the cargo or any part of the cargo is or is not to be delivered to other vessels in port or to be transshipped on the high seas, and, if it is to be so delivered or transshipped, stating the kind and quantities and the value of the total quantity of each kind of article so to be delivered or transshipped, and the name of the person, corporation, vessel, or government to whom the delivery or transshipment is to be made; and the owners, shippers, or consignors of the cargo of such vessel shall in the same manner and under the same conditions deliver to the collector like statements under oath as to the cargo or the parts thereof laden or shipped by them, respectively.

(b) Whoever, in violation of this section, takes or attempts to take, or authorizes the taking of any such vessel, out of port or from the United States, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

The Secretary of the Treasury is authorized to promulgate regulations upon compliance with

which vessels engaged in the coastwise trade or fisheries or used solely for pleasure may be relieved from complying with this section.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 34, 36 (June 15, 1917, ch. 30, title V, §§ 4, 6, 40 Stat. 222; Mar. 28, 1940, ch. 72, § 5, 54 Stat. 79).

Section consolidates said sections of title 18, U.S.C., 1940 ed.

Words "within the United States" were substituted for "within the jurisdiction" etc., in view of the definition of the United States in section 5 of this title.

Mandatory punishment provision was rephrased in the alternative.

Words in subsection (a), referring to title 46, sections 91, 92, and 94, "each of which sections is hereby declared to be and is continued in full force and effect," were omitted as surplusage.

The conspiracy provision of said section 36 was omitted as covered by section 371 of this title. See reviser's note under that section.

The final paragraph of the revised section was added on advice of the Treasury Department, to conform with administrative practice and because of the unnecessary burden upon domestic commerce had the provisions of this section been enforced against coastwise, fishing, and pleasure vessels.

Minor changes of phraseology were made.

References in Text. Section 92 of Title 46, referred to in subsec. (a), was repealed.

Transfer of Functions. All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise in the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, to be terminated not later than Dec. 31, 1966. All functions of the offices so eliminated were already vested in the Secretary of the Treasury.

§ 966. Departure of vessel forbidden for false statements

(a) Whenever it appears that the vessel is not entitled to clearance or whenever there is reasonable cause to believe that the additional statements under oath required in section 965 of this title are false, the collector of customs for the district in which the vessel is located may, subject to review by the head of the department or agency charged with the administration of laws relating to clearance of vessels, refuse clearance to any vessel, domestic or foreign, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, forbid the departure of the vessel from the port or from the United States. It shall thereupon be unlawful for the vessel to depart.

(b) Whoever, in violation of this section, takes or attempts to take, or authorizes the taking of any such vessel, out of port or from the United States, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 35, 36 (June 15, 1917, ch. 30, title V, §§ 5, 6, 40 Stat. 222; Mar. 28, 1940, ch. 72, § 5, 54 Stat. 79).

Section consolidates said sections of title 18, U.S.C., 1940 ed.

Mandatory punishment provision was rephrased in the alternative.

The phrase "by the head of the department or agency charged with the administration of laws relating to clearance of vessels," was substituted for "by the Secretary of Commerce" in view of Executive Order No. 9083 (F.R. 1609) transferring functions to the Commissioner of Customs.

The conspiracy provision of said section 36 was omitted as covered by section 371 of this title. See reviser's note under that section.

Minor changes of phraseology were made.

Transfer of Functions. All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise in the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, to be terminated not later than Dec. 31, 1966. All functions of the offices so eliminated were already vested in the Secretary of the Treasury.

§ 967. Departure of vessel forbidden in aid of neutrality

(a) During a war in which the United States is a neutral nation, the President, or any person authorized by him, may withhold clearance from or to any vessel, domestic or foreign, or, by service of formal notice upon the owner, master, or person in command or in charge of any domestic vessel not required to secure clearances, may forbid its departure from port or from the United States, whenever there is reasonable cause to believe that such vessel is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerent nation in violation of the laws, treaties, or obligations of the United States under the law of nations. It shall thereupon be unlawful for such vessel to depart.

(b) Whoever, in violation of this section, takes or attempts to take, or authorizes the taking of any such vessel, out of port or from the United States, shall be fined not more than $10,000 or imprisoned

not more than ten years, or both. In addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 31, 36 (June 15, 1917, ch. 30, title V, §§ 1, 6, 40 Stat. 221, 222; Mar. 28, 1940, ch. 72, § 5, 54 Stat. 79).

Section consolidates said sections of title 18, U.S.C., 1940 ed., with minor changes in translations and phraseology.

Mandatory punishment provision was rephrased in the alternative.

The conspiracy provision of said section 36 was omitted as covered by section 371 of this title. See reviser's note under that section.

Changes in phraseology were also made.

Delegation of Functions. For delegation to the Secretary of the Treasury of authority vested in the President by this section, see section 1(m) of Ex.Ord. No. 10637, Sept. 16, 1955, 20 F.R. 7025.

[§ 968. Repealed. Aug. 26, 1954, c. 937, Title V, § 542(a)(14), 68 Stat. 861]

§ 969. Exportation of arms, liquors and narcotics to Pacific Islands

(a) Whoever, being subject to the authority of the United States, gives, sells, or otherwise supplies any arms, ammunition, explosive substance, intoxicating liquor, or opium to any aboriginal native of any of the Pacific Islands lying within the twentieth parallel of north latitude and the fortieth parallel of south latitude, and the one hundred and twentieth meridian of longitude west and one hundred and twentieth meridian of longitude east of Greenwich, not being in the possession or under the protection of any civilized power, shall be fined not more than $50 or imprisoned not more than three months or both.

In addition to such punishment, all articles of a similar nature to those in respect to which an offense has been committed, found in the possession of the offender, may be declared forfeited

If it appears to the court that such opium, wine, or spirits have been given bona fide for medical purposes, it shall be lawful for the court to dismiss the charge.

(b) All offenses against this section, committed on any of said islands or on the waters, rocks, or keys adjacent thereto, shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 499, 500 (Mar. 4, 1909, ch. 321, §§ 308, 309, 35 Stat. 1148).

Section consolidates said sections of title 18, U.S.C., 1940 ed., with such changes of phraseology as were necessary to effect consolidation.

Words "and the courts of the United States shall have jurisdiction accordingly," were omitted from subsection (b) as unnecessary in view of sections 3231 and 3238 of this title.

§ 970. Protection of property occupied by foreign governments

(a) Whoever willfully injures, damages, or destroys, or attempts to injure, damage, or destroy, any property, real or personal, located within the United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) Whoever, willfully with intent to intimidate, coerce, threaten, or harass—

(1) forcibly thrusts any part of himself or any object within or upon that portion of any building or premises located within the United States, which portion is used or occupied for official business or for diplomatic, consular, or residential purposes by—

(A) a foreign government, including such use as a mission to an international organization;

(B) an international organization;

(C) a foreign official; or

(D) an official guest; or

(2) refuses to depart from such portion of such building or premises after a request—

(A) by an employee of a foreign government or of an international organization, if such employee is authorized to make such request by the senior official of the unit of such government or organization which occupies such portion of such building or premises;

(B) by a foreign official or any member of the foreign official's staff who is authorized by the foreign official to make such request;

(C) by an official guest or any member of the official guest's staff who is authorized by the official guest to make such request; or

(D) by any person present having law enforcement powers;

shall be fined not more than $500 or imprisoned not more than six months, or both.

(c) For the purpose of this section "foreign government", "foreign official", "international organization", and "official guest" shall have the

same meanings as those provided in section 1116(b) of this title.

(Added Pub.L. 92-539, Title IV, § 401, Oct. 24, 1972, 86 Stat. 1073, and amended Pub.L. 94-467, § 7, Oct. 8, 1976, 90 Stat. 2000.)

CHAPTER 47—FRAUD AND FALSE STATEMENTS

Sec.
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1030. Fraud and related activity in connection with computers.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 80 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Section 80 of title 18, U.S.C., 1940 ed., was divided into two parts.

The provision relating to false claims was incorporated in section 287 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "or any corporation in which the United States of America is a stockholder" in said section 80 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

In addition to minor changes of phraseology, the maximum term of imprisonment was changed from 10 to 5 years to be consistent with comparable sections. (See reviser's note under section 287 of this title.)

Short Title of 1984 Amendments. Section 1601 of Pub.L. 98-473, Title II, c. XVI, Oct. 12, 1984, 98 Stat. 2183, provided: "This chapter [chapter XVI of Title II of Pub.L. 98-473] may be cited as the 'Credit Card Fraud Act of 1984'."

Section 2101 of Pub.L. 89-473, Title II, c. XXI, Oct. 12, 1984, 98 Stat. 2190, provided: "This chapter [chapter XXI of Title II of Pub.L. 98-473] may be cited as the 'Counterfeit Access Device and Computer Fraud and Abuse Act of 1984'."

§ 1002. Possession of false papers to defraud United States

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 74 (Mar. 4, 1909, ch. 321, § 30, 35 Stat. 1094).

Words "or any agency thereof" after "United States" and word "agency" after "any" and before "officer," were inserted to eliminate any possible ambiguity as to scope of section. (See definition of "agency" in section 6 of this title.)

The maximum fine of "$10,000" was substituted for "$500" in order to conform punishment provisions to those of comparable sections. (See section 1001 of this title.)

Minor verbal change was made.

§ 1003. Demands against the United States

Whoever knowingly and fraudulently demands or endeavors to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument, shall be fined not more than $10,000 or imprisoned not more than five years, or both; but if the sum or value so obtained or attempted to be obtained does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 79 (Mar. 4, 1909, ch. 321, § 34, 35 Stat. 1095).

Words "prize money" were deleted on the ground that they are an anachronism and were so before 1909. (See reviser's note under section 915 of this title.)

Mandatory punishment provision was rephrased in the alternative.

The smaller punishment for an offense involving $100 or less was added. (See reviser's note to sections 641 and 645 of this title.)

The maximum term of "five years" was substituted for "ten years" and "$10,000" was substituted for "$5,000" as being more in harmony with punishment provision of similar sections. (See reviser's note under section 1001 of this title.)

Minor changes in phraseology were made.

§ 1004. Certification of checks

Whoever, being an officer, director, agent, or employee of any Federal Reserve bank or member bank of the Federal Reserve System, certifies a check before the amount thereof has been regularly deposited in the bank by the drawer thereof, or resorts to any device, or receives any fictitious obligation, directly or collaterally, in order to evade any of the provisions of law relating to certification of checks, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on section 591 of title 12, U.S.C., 1940 ed., Banks and Banking (R.S. § 5208; July 12, 1882, ch. 290, § 13, 22 Stat. 166; Sept. 26, 1918, ch. 177, § 7, 40 Stat. 972; Feb. 25, 1927, ch. 191, § 12, 44 Stat. 1231).

Words "be deemed guilty of a misdemeanor and shall" were omitted as unnecessary in view of definition of misdemeanor in section 1 of this title.

Words "on conviction thereof" were omitted as surplusage, because punishment cannot be imposed until after conviction.

Words "in any district court of the United States" were omitted as unnecessary, because section 3231 of this title confers jurisdiction on Federal district courts of all crimes and offenses defined in this title.

Changes were made in phraseology.

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

HISTORICAL AND REVISION NOTES

Based on sections 592, 597 of title 12, U.S.C., 1940 ed., Banks and Banking (R.S. § 5209; Dec. 23, 1913, ch. 6, § 22(i) as added June 19, 1934, ch. 653, § 3, 48 Stat. 1107;

Sept. 26, 1918, ch. 177, § 7, 40 Stat. 972; Aug. 23, 1935, ch. 614, § 316, 49 Stat. 712).

(See reviser's note under section 656 of this title for comprehensive statement of reasons for separating section 592 of title 12, U.S.C., 1940 ed., Banks and Banking, into three revised sections, and section 597 thereof into two revised sections, with the consequent extensive changes in phraseology, style, and arrangement.)

In this section, national bank receivers and Federal reserve agents were not included in the initial enumeration of persons at whom the act is directed, since the provisions of this section, unlike section 656 of this title, are not directed at such receivers and agents.

No changes of meaning or substance were made, except that, like said section 656 of this title, the different punishment provisions were reconciled, and one uniform punishment provision was adopted.

The words "shall be deemed guilty of a misdemeanor" were omitted as unnecessary in view of the definition of a misdemeanor in section 1 of this title.

The words "and upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Since section 3231 of this title gives the district court jurisdiction of criminal prosecutions, the words "in any district court of the United States" were omitted as unnecessary.

§ 1006. Federal credit institution entries, reports and transactions

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(As amended May 24, 1949, c. 139, § 20, 63 Stat. 92; July 28, 1956, c. 773, § 2, 70 Stat. 714; Aug. 21, 1958, Pub.L. 85–699, Title VII, § 704, 72 Stat. 698; Oct. 4, 1961, Pub.L. 87–353, § 3(s), 75 Stat. 774; May 25, 1967, Pub.L. 90–19, § 24(a), 81 Stat. 27; Oct. 19, 1970, Pub.L. 91–468, § 6, 84 Stat. 1016.)

Historical and Revision Notes

1948 Act

Based on sections 1026(b) and 1514(c) of title 7, U.S.C., 1940 ed., Agriculture, sections 264(u), 984, 1121, 1138d(c), 1311, 1441(c), 1467(c) and 1731(c) of title 12, U.S.C., 1940 ed., Banks and Banking, and section 616(c) of title 15, U.S.C., 1940 ed., Commerce and Trade (Dec. 23, 1913, ch. 6, § 12B(u), as added June 16, 1933, ch. 89, § 8, 48 Stat. 178; July 17, 1916, ch. 245, § 31, fourth par., 39 Stat. 383; July 17, 1916, ch. 245, § 211(a), as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1459; Mar. 4, 1923, ch. 252, title II, § 216(a), 42 Stat. 1471; Jan. 22, 1932, ch. 8, § 16(c), 47 Stat. 11; July 22, 1932, ch. 522, § 21(c), 47 Stat. 738; Ex. Ord. No. 6084, Mar. 27, 1933; June 13, 1933, ch. 64, § 8(c), 48 Stat. 135; June 16, 1933, ch. 98, § 64(c), 48 Stat. 268; Jan. 31, 1934, ch. 7, § 13, 48 Stat. 347; June 27, 1934, ch. 847, § 512(c), 48 Stat. 1265; Aug. 23, 1935, ch. 614, § 101, 49 Stat. 701; July 22, 1937, ch. 517, title IV, § 52(b), 50 Stat. 532; Feb. 16, 1938, ch. 30, title V, § 514(c), 52 Stat. 76; Aug. 14, 1946, ch. 964, § 3, 60 Stat. 1064).

Each of the eleven sections from which this section was derived contained similar provisions relating to embezzlement, false entries, and fraudulent issuance or assignment of obligations with respect to one or more named agencies or corporations.

These were divided and the false entry and fraudulent issuance or assignment of obligation provisions of all, form the basis of this section. The remaining provisions of each section, relating to embezzlement and misapplication, form the basis for section 657 of this title. That portion of said section 616(c) of title 15, relating to disclosure of information, forms the basis for section 1904 of this title.

Each revised section condenses and simplifies the constituent provisions without change of substance except as herein indicated.

The punishment provisions in each section were the same except that in section 1026(b) of title 7, U.S.C., 1940 ed., and sections 984, 1121, and 1311 of title 12, U.S.C., 1940 ed., the maximum fine was $5,000. This consolidated section adopts the $10,000 maximum fine provided by the seven other sections.

References to persons aiding or abetting contained in sections 984, 1121, and 1311 of title 12, U.S.C., 1940 ed.,

were omitted as unnecessary, as such persons are made principals by section 2 of this title.

The term "receiver," used in sections 1121 and 1311 of title 12, U.S.C., 1940 ed., with reference to Federal intermediate credit banks and agricultural credit corporations, was omitted as this term is undoubtedly embraced in the phrase "or connected in any capacity with."

The term "or of any department or agency of the United States" was inserted in order to clarify the sweeping provisions against fraudulent acts and to eliminate any possible ambiguity as to scope of section. (See definitions of "department" and "agency" in section 6 of this title.)

Words "shall be deemed guilty of a misdemeanor", contained in section 1311 of title 12, U.S.C., 1940 ed., were omitted as unnecessary, in view of definition of misdemeanor in section 1 of this title.

Words "and upon conviction", contained in section 1311 of title 12, U.S.C., 1940 ed., were omitted as surplusage, because punishment cannot be imposed until after conviction.

Words "in any district court of the United States", contained in section 1311 of title 12, U.S.C., 1940 ed., were omitted as unnecessary, because section 3231 of this title confers jurisdiction on the Federal district courts of all crimes and offenses defined in this title.

The conspiracy provisions of section 1138d(f) of title 12, U.S.C., 1940 ed., Banks and Banking, were not added to this consolidated section for reasons stated in reviser's note under section 493 of this title. (See also reviser's note under section 371 of this title.)

1949 Act

[Section 20] conforms section 1006 of title 18, U.S.C., to administrative practice which in turn was modified to comply with congressional policy. (See note to sec. 11 [of 1949 Act, set out in Historical and Revision note under section 657 of this title]).

Abolition of Reconstruction Finance Corporation, Home Owners' Loan Corporation, and the Farmers' Home Corporation. The Reconstruction Finance Corporation, the Home Owners' Loan Corporation, and the Farmers' Home Corporation were abolished.

§ 1007. Federal Deposit Insurance Corporation transactions

Whoever, for the purpose of obtaining any loan from the Federal Deposit Insurance Corporation, or any extension or renewals thereof, or the acceptance, release, or substitution of security therefor, or for the purpose of inducing the Federal Deposit Insurance Corporation to purchase any assets, or for the purpose of obtaining the payment of any insured deposit or transferred deposit or the allowance, approval, or payment of any claim, or for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation, makes any statement, knowing it to be false, or willfully overvalues any security, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on section 264(s) of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 12B(s), as added June 16, 1933, ch. 89, § 8, 48 Stat. 177; Aug. 23, 1935, ch. 614, § 101, 49 Stat. 700).

Words "Federal Deposit Insurance" were inserted before "Corporation" in three places, so as to identify said Corporation, and phrase "under this section" was omitted as no longer applicable, considering transfer of this section to this title.

Minor changes were made in phraseology.

§ 1008. Federal Savings and Loan Insurance Corporation transactions

Whoever, for the purpose of inducing the insurance of the accounts of any institution by the Federal Savings and Loan Insurance Corporation or for the purpose of obtaining any extension or renewal of such insurance by such Corporation or for the purpose of influencing in any way the action of such Corporation, makes, passes, utters, or publishes any statement, knowing the same to be false; or

Whoever, for the purpose of influencing in any way the action of such Corporation, utters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been uttered, forged, or counterfeited, or willfully overvalues any security, asset, or income, of any institution insured or applying for insurance by said Corporation—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on section 1731(f) of title 12, U.S.C., 1940 ed., Banks and Banking (June 27, 1934, ch. 847, § 512(e), as added Feb. 3, 1938, ch. 13, § 10, 52 Stat. 25).

References to persons causing or procuring were omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

§ 1009. Rumors regarding Federal Savings and Loan Insurance Corporation

Whoever willfully and knowingly makes, circulates, or transmits to another or others any statement or rumor, written, printed or by word of mouth, which is untrue in fact and is directly or by inference derogatory to the financial condition or affects the solvency or financial standing of the Federal Savings and Loan Insurance Corporation, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on section 1731(e) of title 12, U.S.C., 1940 ed., Banks and Banking (June 27, 1934, ch. 847, § 512(f), as added Feb. 3, 1938, ch. 13, § 10, 52 Stat. 25).

Words "or who knowingly counsels, aids, procures, or induces another to start, transmit, or circulate any such statement or rumor" were omitted as unnecessary because such persons are principals under section 2 of this title.

Words "is guilty of a misdemeanor" were omitted as unnecessary in view of definition of misdemeanor in section 1 of this title.

Changes were made in phraseology.

§ 1010. Department of Housing and Urban Development and Federal Housing Administration transactions

Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Department of Housing and Urban Development for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Department, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Department, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

(As amended May 25, 1967, Pub.L. 90–19, § 24(c), 81 Stat. 28.)

HISTORICAL AND REVISION NOTES

Based on section 1731(a) of title 12, U.S.C., 1940 ed., Banks and Banking (June 27, 1934, ch. 847, § 512(a), 48 Stat. 1265; Feb. 3, 1938, ch. 13, § 9, 52 Stat. 24).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

"$5,000" was substituted for "$3,000" to make this section more consistent in its punishment provisions with comparable sections. (See section 1008 of this title.)

Minor changes in phraseology were made.

§ 1011. Federal land bank mortgage transactions

Whoever, being a mortgagee, knowingly makes any false statement in any paper, proposal, or letter, relating to the sale of any mortgage, to any Federal land bank; or

Whoever, being an appraiser, willfully overvalues any land securing such mortgage—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on section 987 of title 12, U.S.C., 1940 ed., Banks and Banking (July 17, 1916, ch. 245, § 31, seventh paragraph, as added June 16, 1933, ch. 98, § 78, 48 Stat. 272.)

Minor changes were made in phraseology.

§ 1012. Department of Housing and Urban Development transactions

Whoever, with intent to defraud, makes any false entry in any book of the Department of Housing and Urban Development or makes any false report or statement to or for such Department; or

Whoever receives any compensation, rebate, or reward, with intent to defraud such Department or with intent unlawfully to defeat its purposes; or

Whoever induces or influences such Department to purchase or acquire any property or to enter into any contract and willfully fails to disclose any interest which he has in such property or in the property to which such contract relates, or any special benefit which he expects to receive as a result of such contract—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended Oct. 31, 1951, c. 655, § 26, 65 Stat. 720; May 25, 1967, Pub.L. 90–19, § 24(d), 81 Stat. 28.)

HISTORICAL AND REVISION NOTES

Based on sections 1423–1425 of title 42, U.S.C., 1940 ed., The Public Health and Welfare (Sept. 1, 1937, ch. 896, §§ 23–25, 50 Stat. 899).

Three sections were consolidated with changes of phraseology and arrangement necessary to effect consolidation.

Words "upon conviction thereof", in each section were omitted as surplusage since punishment cannot be imposed until after conviction.

The provisions of section 1424 of title 42, U.S.C., 1940 ed., The Public Health and Welfare, relating to conspiracy were omitted as inconsistent with the general conspiracy statute, section 371 of this title, both as to punishment and allegation and proof of an overt act. (See reviser's note under section 493 of this title.)

§ 1013. Farm loan bonds and credit bank debentures

Whoever deceives, defrauds, or imposes upon, or attempts to deceive, defraud, or impose upon any person, partnership, corporation, or association by making any false pretense or representation concerning the character, issue, security, contents,

conditions, or terms of any farm loan bond, or coupon, issued by any Federal land bank or banks; or of any debenture, coupon, or other obligation, issued by any Federal intermediate credit bank or banks, or by any National Agricultural Credit Corporation; or by falsely pretending or representing that any farm loan bond, or coupon, is anything other than, or different from, what it purports to be on the face of said bond or coupon, shall be fined not more than $500 or imprisoned not more than one year, or both.

(As amended Oct. 12, 1982, Pub.L. 97–297, § 4(a), 96 Stat. 1318.)

HISTORICAL AND REVISION NOTES

Based on sections 985, 1127, and 1317 of title 12, U.S.C., 1940 ed., Banks and Banking (July 17, 1916, ch. 245, § 31, fifth paragraph, 39 Stat. 384; July 17, 1916, ch. 245, § 211(g), as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1461; Mar. 4, 1923, ch. 252, title II, § 216(g), 42 Stat. 1473).

This section condenses and simplifies sections 985, 1127, and 1317 of title 12, U.S.C., 1940 ed., Banks and Banking, each of which contained similar provisions and similar language. The punishment provisions of all three sections were the same.

References to "chapter" and "subchapter" were omitted and words describing the various types of banks or organizations to which said sections 985, 1127, and 1317 of title 12, U.S.C., 1940 ed., Banks and Banking, related, were inserted in lieu. This necessitated some rephrasing and transposition of phrases, but without change of meaning or substance.

Words "upon conviction" which were contained in sections 1127 and 1317 of title 12, U.S.C., 1940 ed., Banks and Banking, were omitted as surplusage, because punishment cannot be imposed until after conviction.

Changes were made in phraseology.

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131–1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

(As amended May 24, 1949, c. 139, § 21, 63 Stat. 92; July 26, 1956, c. 741, Title I, § 109, 70 Stat. 667; Aug. 21, 1958, Pub.L. 85–699, Title VII, § 705, 72 Stat. 699; Aug. 18, 1959, Pub.L. 86–168, Title I, § 104(h), 73 Stat. 387; Oct. 4, 1961, Pub.L. 87–353, § 3(t), 75 Stat. 774; July 2, 1964, Pub.L. 88–353, § 5, 78 Stat. 269; Oct. 19, 1970, Pub.L. 91–468, § 7, 84 Stat. 1017; Dec. 31, 1970, Pub.L. 91–609, Title IX, § 915, 84 Stat. 1815; Oct. 12, 1982, Pub.L. 97–297, § 4(b), 96 Stat. 1318.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 1026(a) and 1514(a) of title 7, U.S.C., 1940 ed., Agriculture, sections 596, 981, 1122, 1123, 1138d(a), 1248, 1312, 1313, 1441(a), and 1467(a), of title 12, U.S.C., 1940 ed., Banks and Banking, and section 616(a) of title 15, U.S.C., 1940 ed., Commerce and Trade (Dec. 23, 1913, ch. 6, § 22(h), as added June 19, 1934, ch. 653, § 3, 48 Stat. 1107; July 17, 1916, ch. 245, § 31, first paragraph, 39 Stat. 382; July 17, 1916, ch. 245, § 211(b), (c), as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1460; Mar. 4, 1923, ch. 252, title II, §§ 209(h), 216(b), (c), 42 Stat. 1468, 1472; Jan. 22, 1932, ch. 8, § 16(a), 47 Stat. 11; July 22, 1932, ch. 522, § 21(a), 47 Stat. 738; June 13, 1933, ch. 64, § 8(a), 48 Stat. 134; June 16, 1933, ch. 98, § 64(a), 48 Stat. 267; Jan. 31, 1934, ch. 7, § 13, 48 Stat. 347; June 3, 1935, ch. 164, § 21, 49 Stat. 319; July 22, 1937, ch. 517, title IV, § 52(a); 50 Stat. 531; Feb. 16, 1938, ch. 30, title V, § 514(a), 52 Stat. 76; Aug. 14, 1946, ch. 964, § 3, 60 Stat. 1064).

Each of the 13 sections from which this section was derived contained similar provisions either relating to false representations and statements, or overvaluation of security, with respect to one or more of the named banks, agencies, or corporations.

These were consolidated and the false statement and security overvaluation provisions of all, form the basis of this section. The provisions of section 981 of title 12, U.S.C., 1940 ed., Banks and Banking, relating to acceptance of loans or gratuities by examiners, were consolidated with similar provisions from other sections to form section 218 [now section 213] of this title. The provisions

of said section 981 of title 12, U.S.C., 1940 ed., Banks and Banking, prohibiting land bank and national farm loan association examiners from performing "any other service for compensation for any bank or banking or loan association, or for any person connected therewith in any capacity" were consolidated with similar provisions from other sections to form section 1909 of this title.

Eight of the consolidated sections contained identical punishment, each providing for a maximum fine of $5,000 and maximum imprisonment of 2 years. Two sections provided for a maximum fine of $10,000 and maximum imprisonment of 5 years. One section provided for maximum fine of $5,000 and maximum imprisonment of 5 years, one section provided for maximum fine of $2,000 and maximum imprisonment of 2 years and one section provided for maximum fine of $5,000 and maximum imprisonment of 1 year.

The punishment by maximum fine of $5,000 or maximum imprisonment of 2 years, or both, provided in this consolidated section was adopted as most consistent with the greater number of comparable sections. (See sections 1008 and 1010 of this title.) This is a reasonable reconciliation of the conflicting punishment provisions and adequate for the offenses described.

The enumeration of "application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan" and the wording "or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor" does not occur in any one of the original sections, but such enumeration and such wording are adequate, and they represent a composite of terms and transactions mentioned in each.

In addition, changes were made in phraseology to secure uniformity of style, and some rephrasing was necessary, but the consolidation was without change of substance except as above indicated.

Section 1138d(f) of Title 12, U.S.C., 1940 ed., Banks and Banking, relating to conspiracy, was not added to this consolidated section for reasons given in reviser's note under section 493 of this title.

1949 Act

[Section 21] conforms section 1014 of Title 18 U.S.C., to administrative practice which in turn was modified to comply with congressional policy. (See note to sec. 11 [of 1949 Act, set out in Historical and Revision note under section 657 of this title]).

References in Text. Sections 1131 to 1134m of Title 12, referred to in text, were either repealed or omitted from the Code.

Federal Savings and Loan Association, referred to in text, deemed also a reference to Federal mutual savings bank, see section 1462 of Title 12, U.S.C.A., Banks and Banking.

Abolition of Reconstruction Finance Corporation, Farmers' Home Corporation, and the Home Owners' Loan Corporation. The Reconstruction Finance Corporation, the Farmers' Home Corporation, and the Home Owners' Loan Corporation were abolished.

§ 1015. Naturalization, citizenship or alien registry

(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens; or

(b) Whoever knowingly, with intent to avoid any duty or liability imposed or required by law, denies that he has been naturalized or admitted to be a citizen, after having been so naturalized or admitted; or

(c) Whoever uses or attempts to use any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or other documentary evidence of naturalization or of citizenship, or any duplicate or copy thereof, knowing the same to have been procured by fraud or false evidence or without required appearance or hearing of the applicant in court or otherwise unlawfully obtained; or

(d) Whoever knowingly makes any false certificate, acknowledgment or statement concerning the appearance before him or the taking of an oath or affirmation or the signature, attestation or execution by any person with respect to any application, declaration, petition, affidavit, deposition, certificate of naturalization, certificate of citizenship or other paper or writing required or authorized by the laws relating to immigration, naturalization, citizenship, or registry of aliens—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on subsections (a), paragraphs (1), (16), (17), (19), (32), (b), (d), and (*l*), of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a), pars. (1), (16), (17), (19), (32), (b), (d), and (*l*), 45 Stat. 1163, 1165, 1167).

Section consolidates, with minor changes, subsection (a), paragraphs (1), (16), (17), (19), (32), and subsections (b), (d), and (*l*), of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality.

Such changes of arrangement and phraseology were made as were appropriate and necessary.

§ 1016. Acknowledgment of appearance or oath

Whoever, being an officer authorized to administer oaths or to take and certify acknowledgments, knowingly makes any false acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person with respect to any proposal, contract, bond, undertaking, or other matter submitted to, made with, or taken on behalf of the United

States or any department or agency thereof, concerning which an oath or affirmation is required by law or lawful regulation, or with respect to the financial standing of any principal, surety, or other party to any such proposal, contract, bond, undertaking, or other instrument, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 75 (Mar. 4, 1909, ch. 321, § 31, 35 Stat. 1094).

Words "or of any department or agency thereof" were inserted after "United States" so as to remove any ambiguity as to scope of section. (See definitions of "department" and "agency" in section 6 of this title.)

§ 1017. Government seals wrongfully used and instruments wrongfully sealed

Whoever fraudulently or wrongfully affixes or impresses the seal of any department or agency of the United States, to or upon any certificate, instrument, commission, document, or paper or with knowledge of its fraudulent character, with wrongful or fraudulent intent, uses, buys, procures, sells, or transfers to another any such certificate, instrument, commission, document, or paper, to which or upon which said seal has been so fraudulently affixed or impressed, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 130 (June 15, 1917, ch. 30, title X, § 1, 40 Stat. 227).

To clarify scope of section and in view of definition of department or agency in section 6 of this title, words "department or agency" were substituted for "executive department, or of any bureau, commission, or office".

Slight verbal changes were also made.

§ 1018. Official certificates or writings

Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined not more than $500 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 195 (Mar. 4, 1909, ch. 321, § 106, 35 Stat. 1107).

Minor changes were made in phraseology.

§ 1019. Certificates by consular officers

Whoever, being a consul, or vice consul, or other person employed in the consular service of the United States, knowingly certifies falsely to any invoice, or other paper, to which his certificate is authorized or required by law, shall be fined not more than $10,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 127 (Mar. 4, 1909, ch. 321, § 70, 35 Stat. 1101).

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

§ 1020. Highway projects

Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project submitted for approval to the Secretary of Transportation; or

Whoever knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or

Whoever knowingly makes any false statement or false representation as to a material fact in any statement, certificate, or report submitted pursuant to the provisions of the Federal-Aid Road Act approved July 11, 1916 (39 Stat. 355), as amended and supplemented,

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(As amended Oct. 31, 1951, c. 655, § 27, 65 Stat. 721; May 6, 1954, c. 181, § 18, 68 Stat. 76; Oct. 15, 1966, Pub.L. 89-670, § 10(f), 80 Stat. 948.)

HISTORICAL AND REVISION NOTES

Based on section 46 of title 23, U.S.C., 1940 ed., Highways (June 19, 1922, ch. 227, § 4, par. 6, 42 Stat. 661).

Words "highway, or related," were inserted before "project" in two places for the purpose of description, in view of transfer from title 23.

Words "upon conviction thereof" were omitted as surplusage, because punishment cannot be imposed until a conviction is secured.

Changes in phraseology were made.

References in Text. The Federal-Aid Road Act approved July 11, 1916 (39 Stat. 355), referred to in text, was repealed. See section 101 et seq. of Title 23, U.S. C.A., Highways.

§ 1021. Title records

Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by such law may be recorded, knowingly certifies falsely that such conveyance or instrument has or has not been recorded, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 194 (Mar. 4, 1909, ch. 321, § 105, 35 Stat. 1107).

Words "five years" were substituted for "seven years" as more in conformity with comparable sections of this chapter.

Minor change was made in phraseology.

§ 1022. Delivery of certificate, voucher, receipt for military or naval property

Whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property used or to be used in the military or naval service, makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any agency thereof, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 84 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Word "agency" was substituted for "department" so as to eliminate any possible ambiguity as to scope of section. (See definitions of "department" and "agency" in section 6 of this title.)

Words "or any corporation in which the United States of America is a stockholder" were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

Minor changes were made in phraseology.

§ 1023. Insufficient delivery of money or property for military or naval service

Whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any agency thereof, or any corporation in which the United States has a proprietary interest, or intending to conceal such money or other property, delivers to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 85 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Word "agency" was substituted for "department" so as to eliminate any possible ambiguity as to scope of section. (See definitions of "department" and "agency" in section 6 of this title.)

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes were made in phraseology.

§ 1024. Purchase or receipt of military, naval, or veteran's facilities property

Whoever purchases, or receives in pledge from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States under a clothing allowance or otherwise, to any member of the Armed Forces of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, or to any former member of such Armed Forces at or by any hospital, home, or facility maintained by the United States, having knowledge or reason to believe that the property has been taken from the possession of or furnished by the United States under such allowance, or otherwise, shall be fined not more than $500 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 86 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197; Apr. 30, 1940, ch. 164, 54 Stat. 171).

Minor changes were made in phraseology.

§ 1025. False pretenses on high seas and other waters

Whoever, upon any waters or vessel within the special maritime and territorial jurisdiction of the United States, by any fraud, or false pretense, obtains from any person anything of value, or

procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, endorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, or fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, endorser, or guarantor thereof to have been obtained by any false pretenses, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount, value or the face value of anything so obtained does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended May 24, 1949, c. 139, § 22, 63 Stat. 92.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 467a (Mar. 4, 1909, ch. 321, § 288A, as added Aug. 5, 1939, ch. 434, 53 Stat. 1205).

Words "upon any waters or vessel within the special maritime and territorial jurisdiction of the United States" were substituted for "upon the high seas or on any waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof", near beginning of section. The deleted words are not necessary in view of definitive section 7 of this title.

Words "whatsoever with intent to defraud" were omitted as being included in the preceding term "false pretenses".

The punishment provision was revised to include a misdemeanor punishment (not more than $1,000 or one year, or both) where the offense involves $100 or less. (See reviser's notes under sections 641 and 645 of this title.)

1949 ACT

This section [section 22] corrects a typographical error in section 1025 of title 18 U.S.C.

§ 1026. Compromise, adjustment, or cancellation of farm indebtedness

Whoever knowingly makes any false statement for the purpose of influencing in any way the action of the Secretary of Agriculture, or of any person acting under his authority, in connection with any compromise, adjustment, or cancellation of any farm indebtedness as provided by sections 1150, 1150a, and 1150b of Title 12, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on section 1150c(a) of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 20, 1944, ch. 623, § 4(a), 58 Stat. 837.)

Words "of Agriculture" were inserted after "Secretary" for reasons of identification.

Words "upon conviction thereof" were omitted as surplusage, since punishment can not be imposed until after conviction.

Other changes were made in phraseology without change of substance.

§ 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974

Whoever, in any document required by the title I of the Employee Retirement Income Security Act of 1974 (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(Added Pub.L. 87–420, § 17(c), Mar. 20, 1962, 76 Stat. 42, and amended Pub.L. 93–406, Title I, § 111(a)(2)(B)(i), (ii), Sept. 2, 1974, 88 Stat. 851.)

References in Text. Title I of the Employee Retirement Income Security Act of 1974, referred to in text, is classified generally to section 1001 et seq. of Title 29, U.S.C.A., Labor.

§ 1028. Fraud and related activity in connection with identification documents

(a) Whoever, in a circumstance described in subsection (c) of this section—

(1) knowingly and without lawful authority produces an identification document or a false identification document;

(2) knowingly transfers an identification document or a false identification document knowing that such document was stolen or produced without lawful authority;

(3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more iden-

tification documents (other than those issued lawfully for the use of the possessor) or false identification documents;

(4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor) or a false identification document, with the intent such document be used to defraud the United States; or

(5) knowingly produces, transfers, or possesses a document-making implement with the intent such document-making implement will be used in the production of a false identification document or another document-making implement which will be so used;

(6) possesses an identification document that is or appears to be an identification document of the United States which is stolen or produced without authority knowing that such document was stolen or produced without authority;

or attempts to do so, shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under subsection (a) of this section is—

(1) a fine of not more than $25,000 or imprisonment for not more than five years, or both, if the offense is—

(A) the production or transfer of an identification document or false identification document that is or appears to be—

(i) an identification document issued by or under the authority of the United States; or

(ii) a birth certificate, or a driver's license or personal identification card;

(B) the production or transfer of more than five identification documents or false identification documents; or

(C) an offense under paragraph (5) of such subsection;

(2) a fine of not more than $15,000 or imprisonment for not more than three years, or both, if the offense is—

(A) any other production or transfer of an identification document or false identification document; or

(B) an offense under paragraph (3) of such subsection; and

(3) a fine of not more than $5,000 or imprisonment for not more than one year, or both, in any other case.

(c) The circumstance referred to in subsection (a) of this section is that—

(1) the identification document or false identification document is or appears to be issued by or under the authority of the United States or the document-making implement is designed or suited for making such an identification document or false identification document;

(2) the offense is an offense under subsection (a)(4) of this section; or

(3) the production, transfer, or possession prohibited by this section is in or affects interstate or foreign commerce, or the identification document, false identification document, or document-making implement is transported in the mail in the course of the production, transfer, or possession prohibited by this section.

(d) As used in this section—

(1) the term "identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals;

(2) the term "produce" includes alter, authenticate, or assemble;

(3) the term "document-making implement" means any implement or impression specially designed or primarily used for making an identification document, a false identification document, or another document-making implement;

(4) the term "personal identification card" means an identification document issued by a State or local government solely for the purpose of identification; and

(5) the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other possession or territory of the United States.

(e) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481).

(Added Pub.L. 97-398, § 2, Dec. 31, 1982, 96 Stat. 2009.)

References in Text. Title V of the Organized Crime Control Act of 1970, referred to in subsec. (e), is Title V of Pub.L. 91-452, Oct. 15, 1970, 84 Stat. 933, which is set out as a note preceding section 3481 of this title.

Format of Documents; Privacy; Sanctions; and Exchange of Information. Section 609L of Pub.L. 98-473, Oct. 12, 1984, 98 Stat. 2103, provided:

"(a) For purposes of section 1028 of title 18, United States Code, to the maximum extent feasible, personal descriptors or identifiers utilized in identification docu-

ments, as defined in such section, shall utilize common descriptive terms and formats designed to—

"(1) reduce the redundancy and duplication of identification systems by providing information which can be utilized by the maximum number of authorities, and

"(2) facilitate positive identification of bona fide holders of identification documents.

"(b) The President shall, no later than 3 years after the date of enactment of this Act [Oct. 12, 1984], and after consultation with Federal, State, local, and international issuing authorities, and concerned groups make recommnedations [sic] to the Congress for the enactment of comprehensive legislation on Federal identification systems. Such legislation shall—

"(1) give due consideration to protecting the privacy of persons who are the subject of any identification system,

"(2) recommend appropriate civil and criminal sanctions for the misuse or unauthorized disclosure of personal identification information, and

"(3) make recommendations providing for the exchange of personal identification information as authorized by Federal or State law or executive order of the President or the chief executive officer of any of the several States."

§ 1029. Fraud and related activity in connection with access devices

(a) Whoever—

(1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;

(2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;

(3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices; or

(4) knowingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device-making equipment;

shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

(b)(1) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(2) Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties engages in any conduct in furtherance of such offense, shall be fined an amount not greater than the amount provided as the maximum fine for such offense under subsection (c) of this section or imprisonment not longer than one-half the period provided as the maximum imprisonment for such offense under subsection (c) of this section, or both.

(c) The punishment for an offense under subsection (a) or (b)(1) of this section is—

(1) a fine of not more than the greater of $10,000 or twice the value obtained by the offense or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2) or (a)(3) of this section which does not occur after a conviction for another offense under either such subsection, or an attempt to commit an offense punishable under this paragraph;

(2) a fine of not more than the greater of $50,000 or twice the value obtained by the offense or imprisonment for not more than fifteen years, or both, in the case of an offense under subsection (a)(1) or (a)(4) of this section which does not occur after a conviction for another offense under either such subsection, or an attempt to commit an offense punishable under this paragraph; and

(3) a fine of not more than the greater of $100,000 or twice the value obtained by the offense or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this paragraph.

(d) the United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section. Such authority of the United States Secret Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section—

(1) the term "access device" means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument);

(2) the term "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;

(3) the term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud;

(4) the term "produce" includes design, alter, authenticate, duplicate, or assemble;

(5) the term "traffic" means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of; and

(6) the term "device-making equipment" means any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device.

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970) [1] 18 U.S.C. note prec. 3481).

(Added Pub.L. 98-473, Title II, § 1602(a), Oct. 12, 1984, 98 Stat. 2183.)

[1] So in original. Probably should be an opening parenthesis.

References in Text. Title V of the Organized Crime Control Act of 1970, referred to in subsec. (f) is title V of Pub.L. 91-452, Oct. 15, 1970, 84 Stat. 933, which is classified as a note preceding section 3481 of this title.

Reports of Prosecutions. Section 1603 of Pub.L. 98-473, Oct. 12, 1984, 98 Stat. 2184, provided: "The Attorney General shall report to the Congress annually, during the first three years following the date of the enactment of this joint resolution [Oct. 12, 1984], concerning prosecutions under the section of title 18 of the United States Code added by this chapter."

§ 1030. Fraud and related activity in connection with computers.

(a) Whoever—

(1) knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and by means of such conduct obtains information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954, with the intent or reason to believe that such information so obtained is to be used to the injury of the United States, or to the advantage of any foreign nation;

(2) knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and thereby obtains information contained in a financial record of a financial institution, as such terms are defined in the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.), or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.); or

(3) knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and by means of such conduct knowingly uses, modifies, destroys, or discloses information in, or prevents authorized use of, such computer, if such computer is operated for or on behalf of the Government of the United States and such conduct affects such operation;

shall be punished as provided in subsection (c) of this section. It is not an offense under paragraph (2) or (3) of this subsection in the case of a person having accessed a computer with authorization and using the opportunity such access provides for purposes to which such access does not extend, if the using of such opportunity consists only of the use of the computer.

(b)(1) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(2) Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties engages in any conduct in furtherance of such offense, shall be fined an amount not greater than the amount provided as the maximum fine for such offense under subsection (c) of this section or imprisoned not longer than one-half the period provided as the maximum imprisonment for such offense under subsection (c) of this section, or both.

(c) The punishment for an offense under subsection (a) or (b)(1) of this section is—

(1)(A) a fine of not more than the greater of $10,000 or twice the value obtained by the offense or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine of not more than the greater of $100,000 or twice the value obtained by the offense or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(2)(A) a fine of not more than the greater of $5,000 or twice the value obtained or loss created by the offense or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2) or (a)(3) of this section which does not occur after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine of not more than the greater of $10,000 or twice the value obtained or loss created by the offense or imprisonment for not [1] than ten years, or both, in the case of an offense under subsection (a)(2) or (a)(3) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph.

(d) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section. Such authority of the United States Secret Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section, the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

(Added Pub.L. 98–473, Title II, § 2102(a), Oct. 12, 1984, 98 Stat. 2190.)

[1] So in original.

References in Text. Paragraph r. of section 11 of the Atomic Energy Act of 1954, referred to in subsec. (a)(1), probably means par. (y), of Act Aug. 1, 1946, c. 724, § 11, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 922 which defines restricted data and which is classified to section 2014(y) of Title 42, The Public Health and Welfare.

The Right to Financial Privacy Act of 1978, referred to subsec. (a)(2), is Title XI of Pub.L. 95–630, Nov. 10, 1978, 92 Stat. 3697, which is classified generally to chapter 35 (§ 3401 et seq.) of Title 12, Banks and Banking.

The Fair Credit Reporting Act, referred to in subsec. (a)(2), is Title VI of Pub.L. 90–321 as added by Pub.L. 91–508, Title VI, Oct. 26, 1970, 84 Stat. 1127, which is classified to subchapter III (§ 1681 et seq.) of chapter 41 of Title 15, Commerce and Trade.

Reports of Prosecutions. Section 2103 of Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 2192, provided: "The Attorney General shall report to the Congress annually, during the first three years following the date of the enactment of this joint resolution [Oct. 12, 1984], concerning prosecutions under the sections of title 18 of the United States Code added by this chapter."

CHAPTER 49—FUGITIVES FROM JUSTICE

Sec.
1071. Concealing person from arrest.
1072. Concealing escaped prisoner.
1073. Flight to avoid prosecution or giving testimony.
1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1071. Concealing person from arrest

Whoever harbors or conceals any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the apprehension of such person, shall be fined not more than $1,000 or imprisoned not more than one year, or both; except that if the warrant or process issued on a charge of felony, or after conviction of such person of any offense, the punishment shall be a fine of not more than $5,000, or imprisonment for not more than five years, or both.

(As amended Aug. 20, 1954, c. 771, 68 Stat. 747.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 246 (Mar. 4, 1909, ch. 321, § 141, 35 Stat. 1114).

Section 246 of title 18, U.S.C., 1940 ed., was divided. Part is in this section and the remainder is incorporated in section 752 of this title.

Minor changes were made in phraseology.

§ 1072. Concealing escaped prisoner

Whoever willfully harbors or conceals any prisoner after his escape from the custody of the Attorney General or from a Federal penal or correctional institution, shall be imprisoned not more than three years.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 753i, 910 (May 14, 1930, ch. 274, § 10, 46 Stat. 327; May 27, 1930, ch. 339, § 10, 46 Stat. 390).

Section consolidates similar language of said sections of title 18, U.S.C., 1940 ed. Remaining provisions are in section 752 of this title.

Words "willfully harbors" were added in conformity with section 1071 of this title. Punishment for harboring violators of the Espionage laws is provided in section 792

of this title. Punishment for harboring deserters from the armed forces is provided in section 1381 of this title.

Minor changes were made in phraseology.

§ 1073. Flight to avoid prosecution or giving testimony

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, or (3) to avoid service of, or contempt proceedings for alleged disobedience of, lawful process requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a State empowered by the law of such State to conduct investigations of alleged criminal activities, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement, or in which an avoidance of service of process or a contempt referred to in clause (3) of the first paragraph of this section is alleged to have been committed, and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

(As amended Apr. 6, 1956, c. 177, § 1, 70 Stat. 100; Oct. 4, 1961, Pub.L. 87–368, 75 Stat. 795; Oct. 15, 1970, Pub.L. 91–452, Title III, § 302, 84 Stat. 932.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 408e (May 18, 1934, ch. 302, 48 Stat. 782; Aug. 2, 1946, ch. 735, 60 Stat. 789).

Said section 408e was rewritten and the phrase "offenses as they are defined either at common law or by the laws of the place from which the fugitive flees" were inserted to remove the ambiguity discussed in the opinion of the Circuit Court of Appeals, Third Circuit, in *Brandenburg v. U.S.*, decided September 6, 1944, not yet reported [144 F.2d 656], reversing the conviction of the appellant. The court held that Congress intended the enumerated offenses to mean those as defined at common law. The effect of the rewritten section is to make the statute applicable whether the offense committed is one defined at common law or by the law of the state from which the fugitive flees.

The words "offense punishable by imprisonment in a penitentiary" were substituted for "felony" to make the statute uniformly applicable and to include crimes of the grade of felony even where, as in New Jersey, they are denominated as misdemeanor, high misdemeanor or otherwise.

Words "from any State, Territory, or possession of the United States or the District of Columbia" were omitted in view of definitive section 10 of this title.

Words "upon conviction thereof" were deleted as surplusage since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

Parental Kidnaping and Interstate or International Flight to Avoid Prosecution Under Applicable State Felony Statutes. Pub.L. 96–611, § 10, Dec. 28, 1980, 94 Stat. 3573, provided that:

"(a) In view of the findings of the Congress and the purposes of sections 6 to 10 of this Act set forth in section 302 [probably means section 7 of Pub.L. 96–611, set out as a note under section 1738A of Title 28, U.S.C.A., Judiciary and Judicial Procedure], the Congress hereby expressly declares its intent that section 1073 of title 18, United States Code [this section], apply to cases involving parental kidnaping and interstate or international flight to avoid prosecution under applicable State felony statutes.

"(b) The Attorney General of the United States, not later than 120 days after the date of the enactment of this section [Dec. 28, 1980] (and once every 6 months during the 3-year period following such 120-day period), shall submit a report to the Congress with respect to steps taken to comply with the intent of the Congress set forth in subsection (a). Each such report shall include—

"(1) data relating to the number of applications for complaints under section 1073 of title 18, United States Code [this section], in cases involving parental kidnaping;

"(2) data relating to the number of complaints issued in such cases; and

"(3) such other information as may assist in describing the activities of the Department of Justice in conformance with such intent."

§ 1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property

(a) Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody, or confinement after conviction, under the laws of the place from which he flees, for willfully attempting to or damaging or destroying by fire or explosive any building, structure, facility, vehicle, dwelling house, synagogue, church, religious center or educational institution, public or private, or (2) to avoid giving testimony in any criminal proceeding relating to any such of-

fense shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(b) Violations of this section may be prosecuted in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement: *Provided, however,* That this section shall not be construed as indicating an intent on the part of Congress to prevent any State, Territory, Commonwealth, or possession of the United States of any jurisdiction over any offense over which they would have jurisdiction in the absence of such section.

(Added Pub.L. 86–449, Title II, § 201, May 6, 1960, 74 Stat. 86.)

CHAPTER 50—GAMBLING

Sec.

1081. Definitions.
1082. Gambling ships.
1083. Transportation between shore and ship; penalties.
1084. Transmission of wagering information; penalties.

Historical and Revision Notes

This section [section 23 of act May 24, 1949] inserts a new chapter 50 (secs. 1081–1083) in title 18, U.S.C. incorporating, with slight changes in phraseology, most of the provisions of act of April 27, 1948 (ch. 235, 62 Stat. 200), which was not incorporated in title 18 when the revision was enacted. Subsection (e) of section 1 of such act, defining "United States", when used in a geographical sense, was omitted as covered by section 5 of such title 18. Section 4 of such act, which provided that nothing in such act "shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof, or to preclude action, otherwise valid, by any State or Territory with respect to the navigable waters within the boundaries of such State or Territory", was omitted as surplusage and unnecessary.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1081. Definitions

As used in this chapter:

The term "gambling ship" means a vessel used principally for the operation of one or more gambling establishments.

The term "gambling establishment" means any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing any game of chance, for money or other thing of value.

The term "vessel" includes every kind of water and air craft or other contrivance used or capable of being used as a means of transportation on water, or on water and in the air, as well as any ship, boat, barge, or other water craft or any structure capable of floating on the water.

The term "American vessel" means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if such vessel is owned by, chartered to, or otherwise controlled by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State.

The term "wire communication facility" means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.

(Added May 24, 1949, c. 139, § 23, 63 Stat. 92, and amended Sept. 13, 1961, Pub.L. 87–216, § 1, 75 Stat. 491.)

§ 1082. Gambling ships

(a) It shall be unlawful for any citizen or resident of the United States, or any other person who is on an American vessel or is otherwise under or within the jurisdiction of the United States, directly or indirectly—

(1) to set up, operate, or own or hold any interest in any gambling ship or any gambling establishment on any gambling ship; or

(2) in pursuance of the operation of any gambling establishment on any gambling ship, to conduct or deal any gambling game, or to conduct or operate any gambling device, or to induce, entice, solicit, or permit any person to bet or play at any such establishment,

if such gambling ship is on the high seas, or is an American vessel or otherwise under or within the jurisdiction of the United States, and is not within the jurisdiction of any State.

(b) Whoever violates the provisions of subsection (a) of this section shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(c) Whoever, being (1) the owner of an American vessel, or (2) the owner of any vessel under or within the jurisdiction of the United States, or (3) the owner of any vessel and being an American citizen, shall use, or knowingly permit the use of, such vessel in violation of any provision of this

section shall, in addition to any other penalties provided by this chapter, forfeit such vessel, together with her tackle, apparel, and furniture, to the United States.

(Added May 24, 1949, c. 139, § 23, 63 Stat. 92.)

§ 1083. Transportation between shore and ship; penalties

(a) It shall be unlawful to operate or use, or to permit the operation or use of, a vessel for the carriage or transportation, or for any part of the carriage or transportation, either directly or indirectly, of any passengers, for hire or otherwise, between a point or place within the United States and a gambling ship which is not within the jurisdiction of any State. This section does not apply to any carriage or transportation to or from a vessel in case of emergency involving the safety or protection of life or property.

(b) The Secretary of the Treasury shall prescribe necessary and reasonable rules and regulations to enforce this section and to prevent violations of its provisions.

For the operation or use of any vessel in violation of this section or of any rule or regulation issued hereunder, the owner or charterer of such vessel shall be subject to a civil penalty of $200 for each passenger carried or transported in violation of such provisions, and the master or other person in charge of such vessel shall be subject to a civil penalty of $300. Such penalty shall constitute a lien on such vessel, and proceedings to enforce such lien may be brought summarily by way of libel in any court of the United States having jurisdiction thereof. The Secretary of the Treasury may mitigate or remit any of the penalties provided by this section on such terms as he deems proper.

(Added May 24, 1949, c. 139, § 23, 63 Stat. 92.)

§ 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(Added Pub.L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.)

CHAPTER 51—HOMICIDE

Sec.
1111. Murder.
1112. Manslaughter.
1113. Attempt to commit murder or manslaughter.
1114. Protection of officers and employees of the United States.
1115. Misconduct or neglect of ship officers.
1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons.
1117. Conspiracy to murder.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson [1] escape, mur-

der, kidnapping, treason, espionage, sabotage,,[2] rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 1004, 98 Stat. 2138.)

[1] So in original. A comma probably should be inserted after "arson".

[2] So in original. Directory language of Pub.L. 98–473 resulted in two commas.

HISTORICAL AND REVISION NOTES

Based on title, 18 U.S.C., 1940 ed., §§ 452, 454, 567 (Mar. 4, 1909, ch. 321, §§ 273, 275, 330, 35 Stat. 1143, 1152).

Section consolidates the punishment provision of sections 454 and 567 of title 18, U.S.C., 1940 ed., with section 452 of title 18, U.S.C. 1940 ed.

The provision of said section 454 for the death penalty for first degree murder was consolidated with section 567 of said title 18, by adding the words "unless the jury qualifies its verdict by adding thereto 'without capital punishment' in which event he shall be sentenced to imprisonment for life".

The punishment for second degree murder was changed and the phrase "for any term of years of for life" was substituted for the words "not less than ten years and may be imprisoned for life". This change conforms to a uniform policy of omitting the minimum punishment.

Said section 567 was not included in section 2031 of this title since the rewritten punishment provision for rape removes the necessity for a qualified verdict.

The special maritime and territorial jurisdiction provision was added in view of definitive section 7 of this title.

§ 1112. Manslaughter

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 453, 454 (Mar. 4, 1909, ch. 321, §§ 274, 275, 35 Stat. 1143).

Section consolidates punishment provisions of sections 453 and 454 of title 18, U.S.C., 1940 ed.

The special maritime and territorial jurisdiction provision was added in view of definitive section 7 [sic] this title.

Minor changes were made in phraseology.

§ 1113. Attempt to commit murder or manslaughter

Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 456 (Mar. 4, 1909, ch. 321, § 277, 35 Stat. 1143).

Words "within the special maritime and territorial jurisdiction of the United States" were added in view of definitive section 7 of this title, and section was rearranged to more clearly express intent of existing law.

Mandatory punishment provision was rephrased in the alternative.

§ 1114. Protection of officers and employees of the United States

Whoever kills or attempts to kill any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, any officer or employee of the Secret Service or of the Drug Enforcement Administration, any officer or member of the United States Capitol Police, any member of the Coast Guard, any employee of the Coast Guard assigned to perform investigative, inspection or law enforcement functions, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of

the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employee of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any civilian official or employee of the Army Corps of Engineers assigned to perform investigations, inspections, law or regulatory enforcement functions, or field-level real estate functions, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare, the Consumer Product Safety Commission, Interstate Commerce Commission, the Department of Commerce, or of the Department of Labor or of the Department of the Interior, or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, or any officer or employee of the Federal Communications Commission performing investigative, inspection, or law enforcement functions, or any officer or employee of the Veterans' Administration assigned to perform investigative or law enforcement functions, or any United States probation or pretrial services officer, or any United States magistrate, or any officer or employee of any department or agency within the Intelligence Community (as defined in section 3.4(F) of Executive Order 12333, December 8, 1981, or successor orders) not already covered under the terms of this section,,[1] any attorney, liquidator, examiner, claim agent, or other employee of the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Comptroller of the Currency, the Federal Home Loan Bank Board, the Board of Governors of the Federal Reserve System, any Federal Reserve bank, or the National Credit Union Administration, or any other officer, agency, or employee of the United States designated for coverage under this section in regulations issued by the Attorney General engaged in or on account of the performance of his official duties, or any officer or employee of the United States or any agency thereof designated to collect or compromise a Federal claim in accordance with sections 3711 and 3716–3718 of title 31 or other statutory authority shall be punished as provided under sections 1111 and 1112 of this title, except that any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

(As amended Oct. 31, 1951, c. 655, § 28, 65 Stat. 721; June 27, 1952, c. 477, Title IV, § 402(c), 66 Stat. 276; July 29, 1958, Pub.L. 85–568, Title III, § 304(d), 72 Stat. 434; July 2, 1962, Pub.L. 87–518, § 10, 76 Stat. 132; Aug. 27, 1964, Pub.L. 88–493, § 3, 78 Stat. 610; July 15, 1965, Pub.L. 89–74, § 8(b), 79 Stat. 234; Aug. 12, 1970, Pub.L. 91–375, § 6(j)(9), 84 Stat. 777; Oct. 27, 1970, Pub.L. 91–513, Title II, § 701(i)(1), 84 Stat. 1282; Dec. 29, 1970, Pub.L. 91–596, § 17(h)(1), 84 Stat. 1607; Oct. 26, 1974, Pub.L. 93–481, § 5, 88 Stat. 1456; May 11, 1976, Pub.L. 94–284, § 18, 90 Stat. 514; Oct. 21, 1976, Pub.L. 94–582, § 16, 90 Stat. 2883; Aug. 3, 1977, Pub.L. 95–87, Title VII, § 704, 91 Stat. 520; Nov. 8, 1978, Pub.L. 95–616, § 3(j)(2), 92 Stat. 3112; Nov. 10, 1978, Pub.L. 95–630, Title III, § 307, 92 Stat. 3677; July 1, 1980, Pub.L. 96–296, § 26(c), 94 Stat. 819; Oct. 17, 1980, Pub.L. 96–466, Title VII, § 704, 94 Stat. 2216; Dec. 29, 1981, Pub.L. 97–143, § 1(b), 95 Stat. 1724; Sept. 13, 1982, Pub.L. 97–259, Title I, § 128, 96 Stat. 1099; Oct. 25, 1982, Pub.L. 97–365, § 6, 96 Stat. 1752; Jan. 12, 1983, Pub.L. 97–452, § 2(b), 96 Stat. 2478; July 30, 1983, Pub.L. 98–63, Title I, § 101, 97 Stat. 313; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1012, 98 Stat. 2142; Oct. 30, 1984, Pub.L. 98–557, § 17(c), 98 Stat. 2868.)

[1] So in original. Directory language of Pub.L. 98–473 resulted in two commas.

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., § 253 (May 18, 1934, ch. 299, § 1, 48 Stat. 780; Feb. 8, 1936, ch. 40, 49 Stat. 1105; June 26, 1936, ch. 830, title I, § 3, 49 Stat. 1940; Reorg. Plan No. II, § 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; June 13, 1940, ch. 359, 54 Stat. 391).

The section was extended to include United States judges, attorneys and their assistants, and officers of Federal, penal and correctional institutions in view of the obvious desirability of such protective legislation.

Employees of the Bureau of Animal Industry have been included in this section to complete the revision of section 118 of title 18, U.S.C. 1940 ed., which was consolidated with the assault provisions of section 254 of said title 18 and is now section 111 of this title. There seemed no sound reason for including such officers in the protection against assaults but excluding them from the homicide sections.

For like reasons the section was broadened to include officers of employees of the Secret Service or of the Bureau of Narcotics.

Changes in phraseology were made.

1949 Act

This section [section 24] amends section 1114 of title 18, U.S.C., to conform more closely with the original statute from which it was derived.

References in Text. Section 3.4(F) of Executive Order 12333, December 8, 1981, referred to in text, probably means section 3.4(F) of Executive Order 12333, December 4, 1981, 46 F.R. 59941.

Change of Name. The Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services and the Secretary, or any other official, of Health, Education, and Welfare was redesignated the Secretary or official, as appropriate, of Health and Human Services by Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, with any reference to the Department, Secretary or other official of Health, Education, and Welfare deemed to refer to the Department, Secretary or other official of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary or Department of Education pursuant to section 301 of Pub.L. 96–88. See sections 3441 and 3508 of Title 20, U.S.C.A., Education.

Life Imprisonment or Lesser Term for Killing Person in Performance of Investigative, Inspection, or Law Enforcement Functions. Section 17(h)(2) of Pub.L. 91–596 provided that: "Notwithstanding the provisions of sections 1111 and 1114 of title 18, United States Code, whoever, in violation of the provisions of section 1114 of such title [this section], kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions added to such section 1114 by paragraph (1) of this subsection [functions performed by officers or employees of the Department of Labor], and who would otherwise be subject to the penalty provisions of such section 1111, shall be punished by imprisonment for any term of years or for life."

Immunity From Criminal Prosecution. Section 5 of Pub.L. 88–493 provided that nothing in Pub.L. 88–493 was to create immunity from criminal prosecution under the laws of any State, territory, possession, Puerto Rico, or the District of Columbia.

§ 1115. Misconduct or neglect of ship officers

Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 461 (Mar. 4, 1909, ch. 321, § 282, 35 Stat. 1144).

Section restores the intent of the original enactments, R.S. § 5344, and act Mar. 3, 1905, ch. 1454, § 5, 33 Stat. 1025, and makes this section one of general application. In the Criminal Code of 1909, by placing it in chapter 11, limited to places within the special maritime and territorial jurisdiction of the United States, such original intent was inadvertently lost as indicated by the entire absence of report or comment on such limitation.

§ 1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

(b) For the purposes of this section:

(1) "Family" includes (a) a spouse, parent, brother or sister, child, or person to whom the foreign official or internationally protected person stands in loco parentis, or (b) any other person living in his household and related to the foreign official or internationally protected person by blood or marriage.

(2) "Foreign government" means the government of a foreign country, irrespective of recognition by the United States.

(3) "Foreign official" means—

(A) a Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of Cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

(B) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or

international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

(4) "Internationally protected person" means—

(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or

(B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

(5) "International organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288) or a public organization created pursuant to treaty or other agreement under international law as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs.

(6) "Official guest" means a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State.

(c) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(38)).

(d) In the course of enforcement of this section and any other sections prohibiting a conspiracy or attempt to violate this section, the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

(Added Pub.L. 92–539, Title 1, § 101, Oct. 24, 1972, 86 Stat. 1071, and amended Pub.L. 94–467, § 2, Oct. 8, 1976, 90 Stat. 1997; Pub.L. 95–163, § 17(b)(1), Nov. 9, 1977, 91 Stat. 1286; Pub.L. 95–504, § 2(b), Oct. 24, 1978, 92 Stat. 1705; Pub.L. 97–351, § 3, Oct. 15, 1982, 96 Stat. 1666.)

References in Text. Section 1 of the International Immunities Act, referred to in subsec. (b)(5), is classified to section 288 of Title 22, U.S.C.A., Foreign Relations and Intercourse.

Section 101(38) of the Federal Aviation Act of 1958, referred to in subsec. (c), is classified to section 1301(38) of Title 49, U.S.C.A., Transportation.

§ 1117. Conspiracy to murder

If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(Added Pub.L. 92–539, Title I, § 101, Oct. 24, 1972, 86 Stat. 1071.)

CHAPTER 53—INDIANS

Sec.

1151. Indian country defined.
1152. Laws governing.
1153. Offenses committed within Indian country.
1154. Intoxicants dispensed in Indian country.
1155. Intoxicants dispensed on school site.
1156. Intoxicants possessed unlawfully.
1157. Livestock sold or removed.[1]
1158. Counterfeiting Indian Arts and Crafts Board trade mark.
1159. Misrepresentation in sale of products.
1160. Property damaged in committing offense.
1161. Application of Indian liquor laws.
1162. State jurisdiction over offenses committed by or against Indians in the Indian country.
1163. Embezzlement and theft from Indian tribal organizations.
1164. Destroying boundary and warning signs.
1165. Hunting, trapping, or fishing on Indian land.

[1] Pub.L. 85–86, July 10, 1957, 71 Stat. 277, which repealed section 1157 of this title, did not amend analysis to reflect the repeal.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and

whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(As amended May 24, 1949, c. 139, § 25, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 548 and 549 of title 18, and sections 212, 213, 215, 217, 218 of title 25, Indians, U.S. Code, 1940 ed. (R.S. §§ 2142, 2143, 2144, 2145, 2146; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318; Mar. 4, 1909, ch. 321, §§ 328, 329, 35 Stat. 1151; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 28, 1932, ch. 284, 47 Stat. 337).

This section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law.

R.S. §§ 2145, 2146 (U.S.C., title 25, §§ 217, 218) extended to the Indian country with notable exceptions the criminal laws of the United States applicable to places within the exclusive jurisdiction of the United States. Crimes of Indians against Indians, and crimes punishable by tribal law were excluded.

The confusion was not lessened by the cases of *U.S. v. McBratney*, 104 U.S. 622 and *Draper v. U.S.*, 17 S.Ct. 107, holding that crimes in Indian country by persons not Indians are not cognizable by Federal courts in absence of reservation or cession of exclusive jurisdiction applicable to places within the exclusive jurisdiction of the United States. Because of numerous statutes applicable only to Indians and prescribing punishment for crimes committed by Indians against Indians, "Indian country" was defined but once. (See act June 30, 1834, ch. 161, § 1, 4, [sic] Stat. 729, which was later repealed.)

Definition is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, 58 S.Ct. 286, 302 U.S. 535, following *U.S. v. Sandoval*, 34 S.Ct. 1, 5, 231 U.S. 28, 46. (See also *Donnelly v. U.S.*, 33 S.Ct. 449, 228 U.S. 243; and *Kills Plenty v. U.S.*, 133 F.2d 292, certiorari denied, 1943, 63 S.Ct. 1172). (See reviser's note under section 1153 of this title.)

Indian allotments were included in the definition on authority of the case of *U.S. v. Pelican*, 1913, 34 S.Ct. 396, 232 U.S. 442, 58 L.Ed. 676.

1949 ACT

This section [section 25], by adding to section 1151 of title 18, U.S.C., the phrase "except as otherwise provided in sections 1154 and 1156 of this title", incorporates in this section the limitations of the term "Indian country" which are added to sections 1154 and 1156 by sections 27 and 28 of this bill.

§ 1152. Laws governing

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

HISTORICAL AND REVISION NOTES

Based on sections 215, 217, 218 of title 25, U.S.C., 1940 ed., Indians (R.S. 2144, 2145, 2146; Feb. 18, 1875, ch. 80, §§ [sic] 1, 18 Stat. 318).

Section consolidates said sections 217 and 218 of title 25, U.S.C., 1940 ed., Indians, and omits section 215 of said title as covered by the consolidation.

See revisor's note under section 1153 of this title as to effect of consolidation of sections 548 and 549 of title 18, U.S.C. 1940 ed.

Minor changes were made in translations and phraseology.

§ 1153. Offenses committed within Indian country

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary, involuntary sodomy, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary, involuntary sodomy, and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

(As amended May 24, 1949, c. 139, § 26, 63 Stat. 94; Nov. 2, 1966, Pub.L. 89-707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub.L. 90-284, § 501, 82 Stat. 80; May 29, 1976, Pub.L. 94-297, § 2, 90 Stat. 585; Oct. 12, 1984, Pub.L. 98-473, Title II, § 1009, 98 Stat. 2141.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 548, 549 (Mar. 4, 1909, ch. 321, §§ 328, 329, 35 Stat. 1151; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 28, 1932, ch. 284, 47 Stat. 337).

Section consolidates said sections 548 and 549 of title 18, U.S.C., 1940 ed. Section 548 of said title covered 10 crimes. Section 549 of said title covered the same except robbery and incest.

The 1932 amendment of section 548 of title 18, U.S.C., 1940 ed., constituting the last paragraph of the section, is omitted and section 549 of said title to which it applied likewise is omitted. The revised section therefore suffices to cover prosecution of the specific offenses committed on all reservations as intended by Congress.

Words "Indian country" were substituted for language relating to jurisdiction extending to reservations and rights-of-way, in view of definitive section 1151 of this title.

Paul W. Hyatt, president, board of commissioners, Idaho State Bar, recommended that said section 548 be considered with other sections in title 25, Indians, U.S.C., 1940 ed., and revised to insure certainty as to questions of jurisdiction, and punishment on conviction. Insofar as the recommendation came within the scope of this revision, it was followed.

The proviso in said section 548 of title 18, U.S.C., 1940 ed., which provided that rape should be defined in accordance with the laws of the State in which the offense was committed, was changed to include burglary so as to clarify the punishment for that offense.

Venue provisions of said section 548 of title 18, U.S.C., 1940 ed., are incorporated in section 3242 of this title.

Section 549 of title 18, U.S.C., 1940 ed., conferred special jurisdiction on the United States District Court for South Dakota of all crimes of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny committed within the limits of any Indian reservation within the State, whether by or against Indians or non-Indians. The Act of February 2, 1903, 32 Stat. 793, from which said section 549 was derived, accepted the cession by South Dakota of such jurisdiction.

The effect of revised sections 1151, 1152, and 1153 of this title is to deprive the United States District Court for the District of South Dakota of jurisdiction of offenses on Indian reservations committed by non-Indians against non-Indians and to restore such jurisdiction to the courts of the State of South Dakota as in other States. This reflects the views of the United States attorney, George Philip, of the district of South Dakota.

Minor changes were made in translation and phraseology.

1949 ACT

This section [section 26] removes an ambiguity in section 1153 of title 18, U.S.C., by eliminating the provision that the crime of rape in the Indian country is to be punished in accordance with the law of the State where the offense was committed, leaving the definition of the offense to be determined by State law, but providing that punishment of rape of an Indian by an Indian is to be by imprisonment at the discretion of the court. The offense of rape, other than rape of an Indian by an Indian within the Indian country, is covered by section 2031 of title 18, U.S.C., and the offense of burglary by sections 1152 and 3242 of such title.

§ 1154. Intoxicants dispensed in Indian country

(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the Department of the Army or any officer duly authorized thereunto by the Department of the Army, but this subsection shall not bar the prosecution of any officer, soldier, sutler or storekeeper, attaché, or employee of the Army of the United States who barters, donates, or furnishes in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian.

(c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(As amended May 24, 1949, c. 139, § 27, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 241, 242, 244a, 249, 254 of title 25, U.S.C. 1940 ed., Indians (R.S. § 2139; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 244; July 4, 1884, ch. 180, § 1, 23 Stat. 94; July 23, 1892, ch. 234, 27 Stat. 260; Mar. 2, 1917, ch. 146, § 17, 39 Stat. 983; June 13, 1932, ch. 245, 47 Stat. 302; Mar. 5, 1934, ch. 43, 48 Stat. 396; June 27, 1934, ch. 846, 48 Stat. 1245; June 15, 1938, ch. 435, § 1, 52 Stat. 696).

Section consolidates sections 241, 242, 244a, and 249 of title 25, U.S.C., 1940 ed., Indians. The portion of section 241 of said title which defined the substantive offense became subsection (a); the portion relating to the scope of the term "Indian country" was omitted as unnecessary in view of definition of "Indian country" in section 1151 of this title; the portion of section 241 of said title excepting liquors introduced by the War Department became subsection (c), as limited by section 249 of said title; the portion respecting making complaint in county of offense, and with reference to arraignment, was omitted as covered by rule 5 of the Federal Rules of Criminal Procedure; and the remainder of section 241 of said title was incorporated in section 1156 of this title.

Section 254 of title 25, U.S.C. 1940 ed., Indians, was omitted as covered by this section and section 1156 of this title. That section was enacted in 1934 and excluded from the Indian liquor laws lands outside reservations where the land was no longer held by Indians under a trust patent or a deed or patent containing restrictions against alienation. Such enactment was prior to the June 15, 1938, amendment of section 241 of title 25, U.S.C., 1940 ed., Indians, in which the term "Indian country" was defined as including allotments where the title was held in trust by the Government or where it was inalienable without the consent of the United States. This provision, by implication, excluded cases where there was no trust or restriction on alienation and thereby achieved the same result as section 254 of title 25, U.S.C., 1940 ed., Indians. That amendment also repealed the act of Jan. 30, 1897, referred to in section 254 of title 25, U.S.C., 1940 ed., Indians. Insofar as the reference in section 254 of said title to "special Indian liquor laws" included section 244 of title 25, U.S.C., 1940 ed., Indians, the definition of Indian country in section 1151 of this title covers section 254 of title 25, U.S.C., 1940 ed., Indians.

Words "or agent" were deleted as there have been no Indian agents since 1908. See section 64 of title 25, U.S.C., 1940 ed., Indians, and note thereunder.

Mandatory punishment provisions were rephrased in the alternative and provision for commitment for nonpayment of fine was deleted. This change was also recommended by United States District Judge T. Blake Kennedy on the ground that, otherwise, section would be practically meaningless since, in most cases, offenders cannot pay a fine.

The exception of intoxicating liquor for scientific, sacramental, medicinal or mechanical purposes was inserted for the same reason that makes this exception appropriate to section 1262 of this title.

Minor changes were made in phraseology.

1949 ACT

Subsection (a) of this section [section 27(a)] substitutes "Department of the Army" for "War Department", in subsection (b) of section 1154 of title 18, U.S.C., to conform to such redesignation by act July 26, 1947 (ch. 343, title 11, § 205(a), 61 Stat. 501 (5 U.S.C., 1946 ed., § 181–1)). Subsection (b) of this section [section 27(b)] adds subsection (c) to such section 1154 in order to conform it and section 1156 more closely to the laws relating to intoxicating liquor in the Indian country as they have heretofore been construed.

§ 1155. Intoxicants dispensed on school site

Whoever, on any tract of land in the former Indian country upon which is located any Indian school maintained by or under the supervision of the United States, manufactures, sells, gives away, or in any manner, or by any means furnishes to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, whether medicated or not, or who carries, or in any manner has carried, into such area any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into such area any of such liquors or drinks, shall be fined not more than $500 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on sections 241a, 244a, of title 25, U.S.C., 1940 ed., Indians (Mar. 1, 1895, ch. 145, § 8, 28 Stat. 697; Mar. 5, 1934, ch. 43, 48 Stat. 396.)

Section consolidates sections 241a and 244a of title 25, U.S.C., 1940 ed., Indians. The effect of section 244a of said title in repealing section 241a of said title, except as to lands upon which Indian schools are maintained, was to continue prohibiting the dispensing of liquor in such areas.

The words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

The minimum punishment provision was omitted to conform to the policy adopted in revision of the 1909 Criminal Code.

Mandatory punishment provision was rephrased in the alternative.

The exception of intoxicating liquor for scientific, sacramental, medicinal or mechanical purposes was inserted for the same reason that makes this exception appropriate to section 1262 of this title.

Minor changes were made in phraseology.

§ 1156. Intoxicants possessed unlawfully

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of

Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto. (As amended May 24, 1949, c. 139, § 28, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 241, 244, 244a, 254 of title 25, U.S.C., 1940 ed., Indians (R.S. 2139; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 244; July 23, 1892, ch. 234, 27 Stat. 260; May 25, 1918, ch. 86, § 1, 40 Stat. 563; June 30, 1919, ch. 4, § 1, 41 Stat. 4; Mar. 5, 1934, ch. 43, 48 Stat. 396; June 27, 1934, ch. 846, 48 Stat. 1245; June 15, 1938, ch. 435, § 1, 52 Stat. 696).

The revision of section 244 of title 25, U.S.C., 1940 ed., Indians, conforms with the effect thereon of sections 241, 244a, and 254 of said title.

The provisions relating to scope of term "Indian country" were omitted as unnecessary in view of definition of "Indian country" in section 1151 of this title.

Mandatory punishment provisions were rephrased in the alternative and provision for commitment for nonpayment of fine was deleted. Such change was also recommended by United States District Judge T. Blake Kennedy. (See reviser's note under section 1154 of this title.)

The exception of intoxicating liquor for scientific, sacramental, medicinal or mechanical purposes was inserted for the same reason that makes this exception appropriate to section 1262 of this title.

Minor changes were made in phraseology.

1949 ACT

This section [section 28] adds to section 1156 of title 18, U.S.C., a paragraph to conform this section and section 1154 of such title more closely to the laws relating to intoxicating liquors in the Indian country as they have been heretofore construed.

[§ 1157. Repealed. Pub.L. 85–86, July 10, 1957, 71 Stat. 277]

§ 1158. Counterfeiting Indian Arts and Crafts Board trade mark

Whoever counterfeits or colorably imitates any Government trade mark used or devised by the Indian Arts and Crafts Board in the Department of the Interior as provided in section 305a of Title 25, or, except as authorized by the Board, affixes any such Government trade mark, or knowingly, willfully, and corruptly affixes any reproduction, counterfeit, copy, or colorable imitation thereof upon any products, or to any labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of such products; or

Whoever knowingly makes any false statement for the purpose of obtaining the use of any such Government trade mark—

Shall be fined not more than $500 or imprisoned not more than six months, or both; and shall be enjoined from further carrying on the act or acts complained of.

HISTORICAL AND REVISION NOTES

Based on section 305d of title 25, U.S.C., 1940 ed., Indians (Aug. 27, 1935, ch. 748, § 5, 49 Stat. 892).

The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of misdemeanor in section 1 of this title.

The words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Maximum fine was changed from $2,000 to $500 to bring the offense within the category of petty offenses defined by section 1 of this title. (See reviser's note under section 1157 of this title.)

Minor changes were made in phraseology.

§ 1159. Misrepresentation in sale of products

Whoever willfully offers or displays for sale any goods, with or without any Government trade mark, as Indian products or Indian products of a particular Indian tribe or group, resident within the United States or the Territory of Alaska, when such person knows such goods are not Indian products or are not Indian products of the particular Indian tribe or group, shall be fined not more than $500 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on section 305e of title 25, U.S.C. 1940 ed., Indians (Aug. 27, 1935, ch. 748, § 6, 49 Stat. 893).

The reference to the offense as a misdemeanor was omitted as unnecessary in view of the definition of misdemeanor in section 1 of this title.

The last paragraph of section 305e of title 25, U.S.C., 1940 ed., relating to duty of district attorney to prosecute violations of such section will be incorporated in title 28, U.S. Code.

Maximum fine of $2,000 was changed to $500 to bring the offense within the category of petty offenses defined by section 1 of this title. (See reviser's note under section 1157 of this title.)

Minor changes were made in phraseology.

§ 1160. Property damaged in committing offense

Whenever a white person, in the commission of an offense within the Indian country takes, injures or destroys the property of any friendly Indian the judgment of conviction shall include a sentence that the defendant pay to the Indian owner a sum equal to twice the just value of the property so taken, injured, or destroyed.

If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence.

HISTORICAL AND REVISION NOTES

Based on sections 227, 228 of title 25, U.S.C., 1940 ed., Indians (R.S. 2154, 2155).

Section consolidates said sections 227 and 228 of title 25, U.S.C., 1940 ed., Indians, with such changes in phraseology as were necessary to effect consolidation.

The phrase "or whose person was injured," which followed the words "friendly Indian to whom the property may belong," was deleted as meaningless.

§ 1161. Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

(Added Aug. 15, 1953, c. 502, § 2, 67 Stat. 586.)

Amendment of Section

Section 223(b) of Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 2028, amended this section by substituting "3669" for "3618" effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(Added Aug. 15, 1953, c. 505, § 2, 67 Stat. 588, and amended Aug. 24, 1954, c. 910, § 1, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85–615, § 1, 72 Stat. 545; Nov. 25, 1970, Pub.L. 91–523, §§ 1, 2, 84 Stat. 1358.)

§ 1163. Embezzlement and theft from Indian tribal organizations

Whoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization; or

Whoever, knowing any such moneys, funds, credits, goods, assets, or other property to have been so embezzled, stolen, converted, misapplied or permitted to be misapplied, receives, conceals, or retains the same with intent to convert it to his use or the use of another—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both.

As used in this section, the term "Indian tribal organization" means any tribe, band, or community of Indians which is subject to the laws of the United States relating to Indian affairs or any corporation, association, or group which is organized under any of such laws.

(Added Aug. 1, 1956, c. 822, § 2, 70 Stat. 792.)

§ 1164. Destroying boundary and warning signs

Whoever willfully destroys, defaces, or removes any sign erected by an Indian tribe, or a Government agency (1) to indicate the boundary of an Indian reservation or of any Indian country as defined in section 1151 of this title or (2) to give notice that hunting, trapping, or fishing is not permitted thereon without lawful authority or permission, shall be fined not more than $250 or imprisoned not more than six months, or both.

(Added Pub.L. 86–634, § 1, July 12, 1960, 74 Stat. 469.)

§ 1165. Hunting, trapping, or fishing on Indian land

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

(Added Pub.L. 86–634, § 2, July 12, 1960, 74 Stat. 469.)

CHAPTER 55—KIDNAPING

Sec.
1201. Kidnaping.
1202. Ransom money.
1203. Hostage taking.

Effective Date of 1984 Amendment. For effective date of addition of item 1203, see section 2003 of Pub.L. 98–473, Title II, c. XX, pt. A, Oct. 12, 1984, 98 Stat. 2186, set out as a note under section 1203 of this title.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 35 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(36) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(36));

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

(5) The person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of his official duties,

shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy,

each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 101(38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(38)).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

(As amended Aug. 6, 1956, c. 971, 70 Stat. 1043; Oct. 24, 1972, Pub.L. 92–539, Title II, § 201, 86 Stat. 1072; Oct. 8, 1976, Pub.L. 94–467, § 4, 90 Stat. 1998; Nov. 9, 1977, Pub.L. 95–163, § 17(b)(1), 91 Stat. 1286; Oct. 24, 1978, Pub.L. 95–504, § 2(b), 92 Stat. 1705; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1007, 98 Stat. 2139.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 408a, 408c (June 22, 1932, ch. 271, §§ 1, 3, 47 Stat. 326; May 18, 1934, ch. 301, 48 Stat. 781, 782).

Section consolidates sections 408a and 408c of title 18 U.S.C., 1940 ed.

Reference to persons aiding, abetting or causing was omitted as unnecessary because such persons are made principals by section 22 of this title.

Words "upon conviction" were omitted as surplusage, because punishment cannot be imposed until a conviction is secured.

Direction as to confinement "in the penitentiary" was omitted because of section 4082 of this title which commits all prisoners to the custody of the Attorney General. (See reviser's note under section 1 of this title.)

The phrase "for any term of years or for life" was substituted for the words "for such term of years as the court in its discretion shall determine" which appeared in said section 408a of Title 18, U.S.C., 1940 ed. This change was made in order to remove all doubt as to whether "term of years" includes life imprisonment.

Minor changes were made in phraseology.

References in Text. Section 101(36) of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1301(36)), referred to in subsec. (a)(3), probably should read section 101(38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1301(38)), to reflect the redesignation of such par. (36).

Short Title of 1984 Amendment. Section 2001 of Pub.L. 98–473, Title II, c. XX, pt. A, Oct. 23, 1984, 98 Stat. 2186, provided: "This part [part A of chapter XX of Title II of Pub.L. 98–473] may be cited as the 'Act for the Prevention and Punishment of the Crime of Hostage-Taking'."

§ 1202. Ransom money

Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of section 1201 of this title, knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 408c–1 (June 22, 1932, ch. 271, § 4, as added Jan. 24, 1936, ch. 29, 49 Stat. 1099).

Words "in the penitentiary" after "imprisoned" were omitted in view of section 4082 of this title committing prisoners to the custody of the Attorney General. (See reviser's note under section 1 of this title.)

Minor changes were made in phraseology.

§ 1203. Hostage taking

(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished by imprisonment for any term of years or for life.

(b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the Government of the United States.

(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organiza-

tion sought to be compelled is the Government of the United States.

(C) [1] As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(Added Pub.L. 98–473, Title II, § 2002(a), Oct. 12, 1984, 98 Stat. 2186.)

[1] So in original. Probably should be "(c)".

Effective Date. Section 2003 of Pub.L. 98–473, Title II, c.XX, pt. A, Oct. 12, 1984, 98 Stat. 2186, provided:

"This part [part A of chapter XX of Title II of Pub.L. 98–473] and the amendments made by this part shall take effect on the later of—

"(1) the date of the enactment of this joint resolution [Oct. 12, 1984]; or

"(2) the date the International Convention Against the Taking of Hostages has come into force and the United States has become a party to that convention."

CHAPTER 57—LABOR

Sec.

1231. Transportation of strikebreakers.
1232. Enticement of workman from armory or arsenal.[1]

[1] Act Aug. 10, 1956, c. 1041, § 53, 70A Stat. 641, which repealed section 1232 of this title, did not amend analysis to reflect the repeal.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031 set out as a note under section 3551 of this title.

§ 1231. Transportation of strikebreakers

Whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of any of the rights of self-organization or collective bargaining; or

Whoever is knowingly transported or travels in interstate or foreign commerce for any of the purposes enumerated in this section—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

This section shall not apply to common carriers.

(As amended May 24, 1949, c. 139, § 30, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 407a (June 24, 1936, ch. 746, 49 Stat. 1899; June 29, 1938, ch. 813, 52 Stat. 1242).

Language designating offense as felony was omitted in uniformity with definitive section 1 of this title. (See reviser's note under section 550 of this title.)

Words "and shall, upon conviction" were omitted as surplusage since punishment cannot be imposed until a conviction is secured.

Reference to persons aiding, abetting or causing was omitted as such persons are made principals by section 2 of this title.

Changes were made in phraseology and arrangement, but without change of substance.

1949 ACT

This section [section 30] corrects a typographical error in section 1231 of title 18, U.S.C.

[§ 1232. Repealed. Aug. 10, 1956, c. 1041, § 53, 70A Stat. 641]

CHAPTER 59—LIQUOR TRAFFIC

Sec.

1261. Enforcement, regulations, and scope.
1262. Transportation into State prohibiting sale.
1263. Marks and labels on packages.
1264. Delivery to consignee.
1265. C.O.D. shipments prohibited.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1261. Enforcement, regulations, and scope

(a) The Secretary of the Treasury shall enforce the provisions of this chapter. Regulations to carry out its provisions shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

(b) This chapter shall not apply to the Canal Zone.

(As amended May 24, 1949, c. 139, § 31, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 222, 223(b), 225 and 226 of title 27, U.S.C., 1940 ed., Intoxicating Liquors (June 25, 1936, ch. 815, §§ 5, 10, 49 Stat. 1929, 1930).

Changes were made in phraseology and arrangement.

1949 ACT

This section [section 31] corrects a typographical error in section 1261 of title 18, U.S.C.

§ 1262. Transportation into State prohibiting sale

Whoever imports, brings, or transports any intoxicating liquor into any State, Territory, District, or Possession in which all sales, except for scientif-

ic, sacramental, medicinal, or mechanical purposes, of intoxicating liquor containing more than 4 per centum of alcohol by volume or 3.2 per centum of alcohol by weight are prohibited, otherwise than in the course of continuous interstate transportation through such State, Territory, District, or Possession or attempts so to do, or assists in so doing,

Shall (1) If such liquor is not accompanied by such permits, or licenses therefor as may be required by the laws of such State, Territory, District, or Possession or (2) if all importation, bringing, or transportation of intoxicating liquor into such State, Territory, District, or Possession is prohibited by the laws thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

In the enforcement of this section, the definition of intoxicating liquor contained in the laws of the respective States, Territories, Districts, or Possessions shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited therein.

(As amended May 24, 1949, c. 139, § 32, 63 Stat. 94.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 222, 223 of title 27, U.S.C., 1940 ed., Intoxicating Liquors (June 25, 1936, ch. 815, §§ 2, 3, 49 Stat. 1928).

Section consolidates subsection (a) of section 222 with section 223, of title 27, U.S.C., 1940 ed.

Words "or 3.2 per centum of alcohol by weight" were inserted after "volume." Such words conform with *Flippin v. U.S.* (1941, 121 F.2d 742, 744, certiorari denied, 62 S.Ct. 184, 314 U.S. 677, 86 L.Ed. 542); *Robason v. U.S.* (1941, 122 F.2d 991); *Dolloff v. U.S.* (1941, 121 F.2d 157, certiorari denied, 62 S.Ct. 108, 314 U.S. 626, 86 L.Ed. 503, rehearing denied, 62 S.Ct. 178, 314 U.S. 710, 86 L.Ed. 566); and *Tucker v. U.S.* (1941, 123 F.2d 280).

Those cases overruled *Arnold v. U.S.* (1940, 115 F.2d 523) and *Gregg v. U.S.* (1940, 116 F.2d 609) and established that preservation of the congressional intent which requires addition of the inserted language.

Subsection (b) of section 223 of title 27, U.S.C., 1940 ed., has been reworded to apply the definition of intoxicating liquor contained in the laws of the respective States to this section only, in accordance with administrative interpretation. Said section 223 was derived from section 3 of the Liquor Enforcement Act of 1936 (Act June 25, 1936, ch. 815, 49 Stat. 1928), which was enacted for the protection of dry States. As originally enacted, its provisions relating to such definition also embraced the interstate commerce liquor laws from which sections 1263–1265 of this title were derived. In the enforcement of the latter, however, their own definitions have been applied and not the definitions of the States into which or through which the liquor was shipped.

Words "Territory, District, or Possession" were inserted after "State", to conform with the definition of "State" given in said section 222 of title 27, U.S.C., 1940 ed. Such section, including subsection (b) thereof, is also incorporated in section 3615 of this title.

Words "be guilty of a misdemeanor and shall" were omitted in view of definitive section 1 of this title.

Minor changes were made throughout in arrangement and phraseology.

1949 ACT

This section [section 32] corrects a typographical error in section 1262 of title 18, U.S.C.

§ 1263. Marks and labels on packages

Whoever knowingly ships into any place within the United States any package containing any spirituous, vinous, malted, or other fermented liquor, or any compound containing any spirituous, vinous, malted, or other fermented liquor fit for use for beverage purposes, unless such shipment is accompanied by copy of a bill of lading, or other document showing the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended Sept. 26, 1968, Pub.L. 90–518, § 1, 82 Stat. 872.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 390 (Mar. 4, 1909, ch. 321, § 240, 35 Stat. 1137; June 25, 1936, ch. 815, § 8, 49 Stat. 1930.)

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

References to Territory, District, etc., were revised and same changes made as in section 1264 of this title.

The provision that "such liquor shall be forfeited to the United States" was omitted as covered by section 3615 of this title, which was derived from section 224 of title 27, U.S.C., 1940 ed., Intoxicating Liquors.

The provision that such liquor "may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law" was likewise omitted as covered by section 3615 of this title, which provides for seizure and forfeiture under the internal revenue laws rather than under provisions of law "for the seizure and forfeiture of property imported into the United States contrary to law" or, in other words, rather than under the customs laws. Section 224 of title 27, U.S.C., 1940 ed., Intoxicating Liquors, on which said section 3615 of this title is based, was derived from the Liquor Enforcement Act of 1936 (Act June 25, 1936, ch. 815, 49 Stat. 1928). Said section 224 included, in its coverage, section 390 of title 18, U.S.C., 1940 ed., on which this revised section is based, even though the Liquor Enforcement Act of 1936, in another section thereof, in amending said section 390, retained the provision that seizures and forfeitures thereunder should be under the customs laws. By eliminating

this conflicting provision, a uniform procedure for seizures and forfeitures, under the internal revenue laws is established under said section 3615 of this title.

§ 1264. Delivery to consignee

Whoever, being an officer, agent, or employee of any railroad company, express company, or other common carrier, knowingly delivers to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, or other fermented liquor or any compound containing any spirituous, vinous, malted, or other fermented liquor fit for use for beverage purposes, which has been shipped into any place within the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 388 (Mar. 4, 1909, ch. 321, § 238, 35 Stat. 1136; June 25, 1936, ch. 815, § 6, 49 Stat. 1929).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof," which appeared twice, were omitted. See section 5 of this title defining the "United States."

Minor changes were made in phraseology.

§ 1265. C.O.D. shipments prohibited

Any railroad or express company, or other common carrier which, or any person who, in connection with the transportation of any spirituous, vinous, malted, or other fermented liquor, or any compound containing any spirituous, vinous, malted, or other fermented liquor fit for use for beverage purposes, into any State, Territory, District or Possession of the United States, which prohibits the delivery or sale therein of such liquor, collects the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or in any manner acts as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 389 (Mar. 4, 1909, ch. 321, § 239, 35 Stat. 1136; June 25, 1936, ch. 815, § 7, 49 Stat. 1929).

Changes similar to those made in section 1264 of this title were also made in this section.

CHAPTER 61—LOTTERIES

Sec.
1301. Importing or transporting lottery tickets.
1302. Mailing lottery tickets or related matter.
1303. Postmaster or employee as lottery agent.[1]
1304. Broadcasting lottery information.
1305. Fishing contests.
1306. Participation by financial institutions.
1307. State-conducted lotteries.

[1] Section catchline was not amended to conform to the change made in text by Pub.L. 91-375.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1301. Importing or transporting lottery tickets

Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 387 (Mar. 4, 1909, ch. 321, § 237, 35 Stat. 1136).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "in interstate or foreign commerce" were substituted for involved enumeration of places, thus permitting section to be condensed and simplified without change of meaning. See definitive section 10 of this title.

The rewritten punishment provision is in lieu of the following: "for the first offense, be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than two years". There seems no point in fixing a punishment for a second offense less than that for the first offense.

Minor changes were made in phraseology.

§ 1302. Mailing lottery tickets or related matter

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

(As amended Oct. 31, 1951, c. 655, § 29, 65 Stat. 721; Sept. 13, 1961, Pub.L. 87-218, § 2, 75 Stat. 492.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 336 (Mar. 4, 1909, ch. 321, § 213, 35 Stat. 1129).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Venue provision was omitted as covered by sections 3231 and 3237 of this title.

Minor changes were made in arrangement and phraseology.

§ 1303. Postmaster or employee as lottery agent [1]

Whoever, being an officer or employee of the Postal Service, acts as agent for any lottery office, or under color of purchase or otherwise, vends lottery tickets, or knowingly sends by mail or delivers any letter, package, postal card, circular, or pamphlet advertising any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any ticket, certificate, or instrument representing any chance, share, or interest in or dependent upon the event of any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes awarded by means of any such scheme, shall be fined not more than $100 or imprisoned not more than one year, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(10), 84 Stat. 778.)

[1] Section catchline was not amended to conform to the change made in text by Pub.L. 91-375.

Historical and Revision Notes

Based on title 18 U.S.C., 1940 ed., § 337 (Mar. 4, 1909, ch. 321, § 214, 35 Stat. 1130). Minor changes were made in phraseology.

§ 1304. Broadcasting lottery information

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

Historical and Revision Notes

Based on section 316 of title 47, U.S.C., 1940 ed., Telegraphs, Telephones, and Radiotelegraphs (June 19, 1934, ch. 652, § 316, 48 Stat. 1088).

Words "upon conviction thereof" were deleted as surplusage since punishment can be imposed only after a conviction.

Minor changes were made in phraseology.

§ 1305. Fishing contests

The provisions of this chapter shall not apply with respect to any fishing contest not conducted for profit wherein prizes are awarded for the specie, size, weight, or quality of fish caught by contestants in any bona fide fishing or recreational event.

(Added Aug. 16, 1950, c. 722, § 1, 64 Stat. 451.)

§ 1306. Participation by financial institutions

Whoever knowingly violates section 5136A of the Revised Statutes of the United States, section 9A of the Federal Reserve Act, section 20 of the Federal Deposit Insurance Act, or section 410 of the

National Housing Act shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(Added Pub.L. 90–203, § 5(a), Dec. 15, 1967, 81 Stat. 611.)

References in Text. Section 5136A of the Revised Statutes of the United States, referred to in text, is classified to section 25a of Title 12, U.S.C.A., Banks and Banking.

Section 9A of the Federal Reserve Act, referred to in text, is classified to section 339 of Title 12.

Section 20 of the Federal Deposit Insurance Act, referred to in text, is classified to section 1829a of Title 12.

Section 410 of the National Housing Act, referred to in text, is classified to section 1730c of Title 12.

§ 1307. State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law—

(1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

(Added Pub.L. 93–583, § 1, Jan. 2, 1975, 88 Stat. 1916, and amended Pub.L. 94–525, § 1, Oct. 17, 1976, 90 Stat. 2478; Pub.L. 96–90, § 1, Oct. 23, 1979, 93 Stat. 698.)

CHAPTER 63—MAIL FRAUD

Sec.

1341. Frauds and swindles.
1342. Fictitious name and address.[1]
1343. Fraud by wire, radio, or television.
1344. Bank fraud.
1345. Injunctions against fraud.

[1] So in original. Catchline reads "Fictitious name or address".

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91–375, § 6(j)(11), 84 Stat. 778.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., § 338 (Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130).

The obsolete argot of the underworld was deleted as suggested by Hon. Emerich B. Freed, United States district judge, in a paper read before the 1944 Judicial Conference for the sixth circuit in which he said:

A brief reference to § 1341, which proposes to reenact the present section covering the use of the mails to defraud. This section is almost a page in length, is involved, and contains a great deal of superfluous language, including such terms as "sawdust swindle, green

articles, green coin, green goods and green cigars." This section could be greatly simplified, and now-meaningless language eliminated.

The other surplusage was likewise eliminated and the section simplified without change of meaning.

A reference to causing to be placed any letter, etc. in any post office, or station thereof, etc., was omitted as unnecessary because of definition of "principal" in section 2 of this title.

1949 Act

This section [section 34] corrects a typographical error in section 1341 of title 18, U.S.C.

§ 1342. Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(12), 84 Stat. 778.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 339 (Mar. 4, 1909, ch. 321, § 216, 35 Stat. 1131).

The punishment language used in section 1341 of this title was substituted in lieu of the reference to it in this section.

Minor changes in phraseology were made.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.)

§ 1344. Bank fraud

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "federally chartered or insured financial institution" means—

(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

(3) a credit union with accounts insured by the National Credit Union Administration Board;

(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States.

(Added Pub.L. 98-473, Title II, § 1108(a), Oct. 12, 1984, 98 Stat. 2147.)

§ 1345. Injunctions against fraud

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a violation of this chapter, the Attorney General may initiate a civil proceeding in a district court of the United States to enjoin such violation. The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

(Added Pub.L. 98-473, Title II, § 1205(a), Oct. 12, 1984, 98 Stat. 2152.)

CHAPTER 65—MALICIOUS MISCHIEF

Sec.
1361. Government property or contracts.
1362. Communication lines, stations or systems.
1363. Buildings or property within special maritime and territorial jurisdiction.
1364. Interference with foreign commerce by violence.
1365. Tampering with consumer products.
1365.[1] Destruction of an energy facility.

[1] So in original. Two sections 1365 have been enacted.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1361. Government property or contracts

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:

If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 82 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

The embezzlement and theft provisions of section 82 of title 18, U.S.C., 1940 ed., are now incorporated in section 641 of this title.

Words "or any corporation in which the United States of America is a stockholder" were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

Designation of the place of confinement as "in a jail" was omitted because section 4082 of this title commits all prisoners to the custody of the Attorney General or his authorized representative, who shall designate the place of confinement. (See reviser's note under section 1 of this title.)

The smaller penalty for offenses involving $50 or less was extended to offenses involving $100 or less. The use of $50 as the dividing line between felonies and misdemeanors originated at a time when that sum was of much greater value than $100 is now.

The word "damage" was substituted twice for the word "value", and the definition of "value" was omitted as inapplicable to this section. These words and definition, however, are retained in that part of said section 82 which is now section 641 of this title.

Minor changes were made in phraseology.

§ 1362. Communication lines, stations or systems

Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone or cable, line, station, or system, or other means of communication, operated or controlled by the United States, or used or intended to be used for military or civil defense functions of the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In the case of any works, property, or material, not operated or controlled by the United States, this section shall not apply to any lawful strike activity, or other lawful concerted activities for the purposes of collective bargaining or other mutual aid and protection which do not injure or destroy any line or system used or intended to be used for the military or civil defense functions of the United States.

(As amended Sept. 26, 1961, Pub.L. 87–306, 75 Stat. 669.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 116 (Mar. 4, 1909, ch. 321, § 60, 35 Stat. 1099).

This section was extended to include radio and radio stations. Minor changes were made in phraseology.

§ 1363. Buildings or property within special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously destroys or injures or attempts to destroy or injure any building, structure or vessel, any machinery or building materials and supplies, military or naval stores, munitions of war or any structural aids or appliances for navigation or shipping, shall be fined not more than $1,000 or imprisoned not more than five years, or both, and if the building be a dwelling, or the life of any person be placed in jeopardy, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 464, 465 (Mar. 4, 1909, ch. 321, §§ 285, 286, 35 Stat. 1144).

Said sections were consolidated and rewritten both as to form and substance. The provisions relating to arson are incorporated in section 81 of this title. (See reviser's note under said section 81 of this title for explanation of changes.)

§ 1364. Interference with foreign commerce by violence

Whoever, with intent to prevent, interfere with, or obstruct or attempt to prevent, interfere with, or obstruct the exportation to foreign countries of articles from the United States, injures or destroys, by fire or explosives, such articles or the places where they may be while in such foreign commerce, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 381 (June 15, 1917, ch. 30, titles IV, XIII, § 1, 40 Stat. 221, 231; Mar. 28, 1940, ch. 72, § 4, 54 Stat. 79).

Mandatory punishment provisions were rephrased in the alternative.

Definition of the term "United States" was omitted and incorporated in section 5 of this title.

Minor verbal changes were made.

§ 1365.[1] Tampering with consumer products

(a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall—

(1) in the case of an attempt, be fined not more than $25,000 or imprisoned not more than ten years, or both;

(2) if death of an individual results, be fined not more than $100,000 or imprisoned for any term of years or for life, or both;

(3) if serious bodily injury to any individual results, be fined not more than $100,000 or imprisoned not more than twenty years, or both; and

(4) in any other case, be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, with intent to cause serious injury to the business of any person, taints any consumer product or renders materially false or misleading the labeling of, or container for, a consumer product, if such consumer product affects interstate or foreign commerce, shall be fined not more than $10,000 or imprisoned not more than three years, or both.

(c)(1) Whoever knowingly communicates false information that a consumer product has been tainted, if such product or the results of such communication affect interstate or foreign commerce, and if such tainting, had it occurred, would create a risk of death or bodily injury to another person, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(2) As used in paragraph (1) of this subsection, the term "communicates false information" means communicates information that is false and that the communicator knows is false, under circumstances in which the information may reasonably be expected to be believed.

(d) Whoever knowingly threatens, under circumstances in which the threat may reasonably be expected to be believed, that conduct that, if it occurred, would violate subsection (a) of this section will occur, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(e) Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties intentionally engages in any conduct in furtherance of such offense, shall be fined not more than $25,000 or imprisoned not more than ten years, or both.

(f) In addition to any other agency which has authority to investigate violations of this section, the Food and Drug Administration and the Department of Agriculture, respectively, have authority to investigate violations of this section involving a consumer product that is regulated by a provision of law such Administration or Department, as the case may be, administers.

(g) As used in this section—

(1) the term "consumer product" means—

(A) any "food", "drug", "device", or "cosmetic", as those terms are respectively defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321); or

(B) any article, product, or commodity which is customarily produced or distributed for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household, and which is designed to be consumed or expended in the course of such consumption or use;

(2) the term "labeling" has the meaning given such term in section 201(m) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(m));

(3) the term "serious bodily injury" means bodily injury which involves—

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(4) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary.

(Added Pub.L. 98–127, § 2, Oct. 13, 1983, 97 Stat. 831.)

[1] So in original. Another section 1365 is set out post.

References in Text. Section 201 of the Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (c)(2) and (g)(1)(A), is classified to section 321 of Title 21, U.S.C.A., Food and Drugs.

§ 1365.[1] Destruction of an energy facility

(a) Whoever knowingly and willfully damages the property of an energy facility in an amount that in fact exceeds $100,000, or damages the property of an energy facility in any amount and causes a significant interruption or impairment of a function of an energy facility, shall be punishable by a fine of not more than $50,000 or imprisonment for not more than ten years, or both.

(b) Whoever knowingly and willfully damages the property of an energy facility in an amount that in fact exceeds $5,000 shall be punishable by a fine of not more than $25,000, or imprisonment for not more than five years, or both.

(c) For purposes of this section, the term "energy facility" means a facility that is involved in the production, storage, transmission, or distribution of electricity, fuel, or another form or source of energy, or research, development, or demonstration facilities, relating thereto, regardless of whether such facility is still under construction or is otherwise not functioning, except a facility subject to the jurisdiction, administration, or in the custody of the Nuclear Regulatory Commission or interstate transmission facilities, as defined in 49 U.S.C. 1671.

(Added Pub.L. 98–473, Title II, § 1011(a), Oct. 12, 1984, 98 Stat. 2141.)

[1] So in original. Another sections 1365 is set out ante.

CHAPTER 67—MILITARY AND NAVY

Sec.
1381. Enticing desertion and harboring deserters.
1382. Entering military, naval, or Coast Guard property.
1383. Restrictions in military areas and zones.[1]
1384. Prostitution near military and naval establishments.
1385. Use of Army and Air Force as posse comitatus.

[1] Section repealed without amending chapter analysis to reflect such repeal.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1381. Enticing desertion and harboring deserters

Whoever entices or procures, or attempts or endeavors to entice or procure any person in the Armed Forces of the United States, or who has been recruited for service therein, to desert therefrom, or aids any such person in deserting or in attempting to desert from such service; or

Whoever harbors, conceals, protects, or assists any such person who may have deserted from such service, knowing him to have deserted therefrom, or refuses to give up and deliver such person on the demand of any officer authorized to receive him—

Shall be fined not more than $2,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 94 (Mar. 4, 1909, ch. 321, § 42, 35 Stat. 1097).

Mandatory punishment provisions were changed to alternative.

Words "armed forces" were substituted for repeated references to military service, naval service, soldier and seamen.

Minor changes were made in phraseology.

§ 1382. Entering military, naval, or Coast Guard property

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 97 (Mar. 4, 1909, ch. 321, § 45, 35 Stat. 1097; Mar. 28, 1940, ch. 73, 54 Stat. 80).

Reference to territory, Canal Zone, Puerto Rico and the Philippine Islands was omitted as covered by definition of United States in section 5 of this title.

Words "naval or Coast Guard" were inserted before "reservation" and words "yard, station, or installation" were inserted after "arsenal" in two places, so as to extend section to naval or Coast Guard property.

Minor changes were made in phraseology.

[§ 1383. Repealed. Pub.L. 94–412, Title V, § 501(e), Sept. 14, 1976, 90 Stat. 1258]

Savings Provision. Repeal of section not to affect any action taken or proceeding pending at the time of the repeal.

§ 1384. Prostitution near military and naval establishments

Within such reasonable distance of any military or naval camp, station, fort, post, yard, base, cantonment, training or mobilization place as the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or any two or all of them shall determine to be needful to the efficiency, health, and welfare of the Army, the Navy, or the Air Force, and shall designate and publish in general orders or bulletins, whoever engages in prostitution or aids or abets prostitution or procures or solicits for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or bawdy house, or receives any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or permits any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building or leases or rents or contracts to lease or rent any vehicle, conveyance, place, structure or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The Secretaries of the Army, Navy, and Air Force and the Federal Security Administrator shall take such steps as they deem necessary to suppress and prevent such violations thereof, and shall accept the cooperation of the authorities of States and their counties, districts, and other political subdivisions in carrying out the purpose of this section.

This section shall not be construed as conferring on the personnel of the Departments of the Army, Navy, or Air Force or the Federal Security Agency any authority to make criminal investigations, searches, seizures, or arrests of civilians charged with violations of this section.

(As amended May 24, 1949, c. 139, § 35, 63 Stat. 94.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., § 518a (July 11, 1941, ch. 287, 55 Stat. 583; May 15, 1945, ch. 126, 59 Stat. 168; May 15, 1946, ch. 258, 60 Stat. 182).

The word "whoever" was substituted for the words "person, corporation, partnership, or association" in conformity with section 1 of title 1, U.S.C., 1940 ed., General Provisions, as amended and without change of substance.

The provisions with reference to punishment of persons subject to military or naval law as provided in the Articles of War and the Articles for the Government of the Navy were omitted, as was the exception of such persons from the punishment provisions of this section. The Articles of War and Articles for the Government of the Navy are sufficiently complete in themselves to authorize the adequate punishment of military or naval personnel for violations of general criminal statutes as well as for disobedience of orders. See Articles of War, Article 96, section 1568 of title 10, U.S.C., 1940 ed., Army, and Articles for the Government of the Navy, Articles 1, 4, 22, 23, section 1200, of title 34, U.S.C., 1940 ed., Navy.

The revised section, in this respect, places violations on the same basis as other misdemeanors in violation of the general statutes of the United States and authorizes punishment of persons subject to military or naval law under such law, or in case the military or naval authorities turn the violator over to the civil authorities, the trial and punishment may be under the general law.

The phrase "and/or" appearing twice in section 581a of title 18, U.S.C., 1940 ed., was deleted to avoid uncertainty and ambiguity.

Words "shall be deemed guilty of a misdemeanor" were omitted because of definition of misdemeanor in section 1 of this title.

Changes were made in phraseology.

1949 Act

This section [section 35] makes the following changes in section 1384 of title 18, U.S.C.:

1. In my first paragraph, substitutes "Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, and any two or all of them" for "Secretary of the Army or the Secretary of the Navy, or both", and substitutes "Army, the Navy, or the Air Force," for "Army or the Navy, or both,", in view of the establishment in 1947 of the Department of the Air Force, headed by a Secretary.

2. In the second paragraph, substitutes "The Secretaries of the Army, Navy, and Air Force" for "The Secretaries of the Army, and Navy", for the same reason given in item 1 above.

3. In the third paragraph, substitutes "Department of the Army, Navy, or Air Force" for "War or Navy Department" for the same reason given in item 1 above.

Transfer of Functions. All functions of the Federal Security Administrator were transferred to the Secretary of Health, Education, and Welfare and all agencies of the Federal Security Agency were transferred to the Department of Health, Education and Welfare by section 5 of Reorg. Plan No. 1 of 1953, eff. Apr. 11, 1953, 18 F.R.

2053, 67 Stat. 631, set out in the Appendix to Title 5, Government Organization and Employees. The Federal Security Agency and the office of Administrator were abolished by section 8 of Reorg. Plan No. 1 of 1953.

Change of Name. The Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services and the Secretary, or any other official, of Health, Education, and Welfare was redesignated the Secretary or official, as appropriate, of Health and Human Services by Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, with any reference to the Department, Secretary or other official of Health, Education, and Welfare deemed to refer to the Department, Secretary or other official of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary or Department of Education pursuant to section 301 of Pub.L. 96–88. See sections 3441 and 3508 of Title 20, U.S.C.A., Education.

§ 1385. Use of Army and Air Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(Added Aug. 10, 1956, c. 1041, § 18(a), 70A Stat. 626, and amended June 25, 1959, Pub.L. 86–70, § 17(d), 73 Stat. 144.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1385	10:15	June 18, 1878, ch. 263, § 15, 20 Stat. 152; Mar. 3, 1899, ch. 429, § 363 (proviso); added June 6, 1900, ch. 786, § 29 (less last proviso), 31 Stat. 330.

This section is revised to conform to the style and terminology used in title 18. It is not enacted as a part of title 10, United States Code, since it is more properly allocated to title 18.

[CHAPTER 68—REPEALED]

[§§ 1401 to 1407. Repealed. Pub.L. 91–513, Title III, § 1101(b)(1)(A), Oct. 27, 1970, 84 Stat. 1292]

CHAPTER 69—NATIONALITY AND CITIZENSHIP

Sec.

1421. Accounts of court officers.
1422. Fees in naturalization proceedings.
1423. Misuse of evidence of citizenship or naturalization.
1424. Personation or misuse of papers in naturalization proceedings.
1425. Procurement of citizenship or naturalization unlawfully.
1426. Reproduction of naturalization or citizenship papers.
1427. Sale of naturalization or citizenship papers.
1428. Surrender of canceled naturalization certificate.
1429. Penalties for neglect or refusal to answer subpena.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1421. Accounts of court officers

Whoever, being a clerk or assistant clerk of a court, or other person charged by law with a duty to render true accounts of moneys received in any proceeding relating to citizenship, naturalization, or registration of aliens or to pay over any balance of such moneys due to the United States, willfully neglects to do so within thirty days after said payment shall become due and demand therefor has been made, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsections (a)(34), (d) and (*l*) of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a)(34), (d)(*l*), 54 Stat. 1167, 1168).

Minor changes in phraseology only were made.

§ 1422. Fees in naturalization proceedings

Whoever knowingly demands, charges, solicits, collects, or receives, or agrees to charge, solicit, collect, or receive any other or additional fees or moneys in proceedings relating to naturalization or citizenship or the registry of aliens beyond the fees and moneys authorized by law, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsections (a)(33), (d), (*l*) of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a)(33), (d), (*l*), 54 Stat. 1167, 1168).

Minor changes in phraseology were made.

§ 1423. Misuse of evidence of citizenship or naturalization

Whoever knowingly uses for any purpose any order, certificate, certificate of naturalization, certificate of citizenship, judgment, decree, or exemplification, unlawfully issued or made, or copies or

duplicates thereof, showing any person to be naturalized or admitted to be a citizen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsections (a)(14), (b), (d) of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a)(14), (b), (d), 54 Stat. 1165, 1167.)

Section consolidates subsections (a) paragraph (14), (b), (d), and the general punishment provision of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality.

The reference "for the purpose of voting" was omitted as surplusage being embraced in the all-inclusive phrase "for any purpose."

Changes in phraseology were made.

§ 1424. Personation or misuse of papers in naturalization proceedings

Whoever, whether as applicant, declarant, petitioner, witness or otherwise, in any naturalization or citizenship proceeding, knowingly personates another or appears falsely in the name of a deceased person or in an assumed or fictitious name; or

Whoever knowingly and unlawfully uses or attempts to use, as showing naturalization or citizenship of any person, any order, certificate, certificate of naturalization, certificate of citizenship, judgment, decree, or exemplification, or copies or duplicates thereof, issued to another person, or in a fictitious name or in the name of a deceased person—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsection (a) pars. (6)(a), (b), (15), (b), (d) of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a), pars. (6), (15), (b), (d), 54 Stat. 1164, 1165, 1167).

Section consolidates with minor verbal changes, subsections (a), pars. (6)(a), (b), (15), (b), (d), and the general punishment provision of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality.

§ 1425. Procurement of citizenship or naturalization unlawfully

(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or

(b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsections (a) pars. (2)–(5), (7), (b), and (d) of section 746 of Title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a), pars. (2)–(5), (7), (b), (d), 54 Stat. 1163, 1164, 1167).

Section consolidates five similar paragraphs, and the punishment provisions of subsection (d) of said section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality, with minor necessary changes in translations and phraseology. Numerous references to aiding and assisting were omitted as unnecessary as such persons are principals under definitive section 2 of this title.

Words "a certificate of arrival or" were inserted before "any certificate" in subsection (b), so as to remove any doubt as to scope of section.

§ 1426. Reproduction of naturalization or citizenship papers

(a) Whoever falsely makes, forges, alters or counterfeits any oath, notice, affidavit, certificate of arrival, declaration of intention, certificate or documentary evidence of naturalization or citizenship or any order, record, signature, paper or proceeding or any copy thereof, required or authorized by any law relating to naturalization or citizenship or registry of aliens; or

(b) Whoever utters, sells, disposes of or uses as true or genuine, any false, forged, altered, antedated or counterfeited oath, notice, affidavit, certificate of arrival, declaration of intention to become a citizen, certificate or documentary evidence of naturalization or citizenship, or any order, record, signature or other instrument, paper or proceeding required or authorized by any law relating to naturalization or citizenship or registry of aliens, or any copy thereof, knowing the same to be false, forged, altered, antedated or counterfeited; or

(c) Whoever, with intent unlawfully to use the same, possesses any false, forged, altered, antedated or counterfeited certificate of arrival, declaration of intention to become a citizen, certificate or documentary evidence of naturalization or citizenship purporting to have been issued under any law of the United States, or copy thereof, knowing the same to be false, forged, altered, antedated or counterfeited; or

(d) Whoever, without lawful authority, engraves or possesses, sells or brings into the United States any plate in the likeness or similitude of any plate designed, for the printing of a declaration of inten-

tion, or certificate or documentary evidence of naturalization or citizenship; or

(e) Whoever, without lawful authority, brings into the United States any document printed therefrom; or

(f) Whoever, without lawful authority, possesses any blank certificate of arrival, blank declaration of intention or blank certificate of naturalization or citizenship provided by the Immigration and Naturalization Service, with intent unlawfully to use the same; or

(g) Whoever, with intent unlawfully to use the same, possesses a distinctive paper adopted by the proper officer or agency of the United States for the printing or engraving of a declaration of intention to become a citizen, or certificate of naturalization or certificate of citizenship; or

(h) Whoever, without lawful authority, prints, photographs, makes or executes any print or impression in the likeness of a certificate of arrival, declaration of intention to become a citizen, or certificate of naturalization or citizenship, or any part thereof—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsections (a) pars. (8)–(12), (16), (17), (20)–(29), (b), (d), (*l*) of section 746 of Title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a) pars. (8)–(12), (16), (17), (20)–(29), (b), (d), (*l*), 54 Stat. 1164–1168).

Section [sic] consolidates numerous similar paragraphs with necessary changes in phraseology and translations.

References to persons causing, procuring, aiding, abetting, or assisting were omitted as unnecessary, such persons being principals under definitive section 2 of this title.

§ 1427. Sale of naturalization or citizenship papers

Whoever unlawfully sells or disposes of a declaration of intention to become a citizen, certificate of naturalization, certificate of citizenship or copies or duplicates or other documentary evidence of naturalization or citizenship, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsections (a) par. (13), (d) of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a)(13), (d), 54 Stat. 1165, 1167).

Minor changes were made in phraseology.

§ 1428. Surrender of canceled naturalization certificate

Whoever, having in his possession or control a certificate of naturalization or citizenship or a copy thereof which has been canceled as provided by law, fails to surrender the same after at least sixty days' notice by the appropriate court or the Commissioner or Deputy Commissioner of Immigration, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on subsections (a) par. (31), (b), (d) of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a) par. (31), (b), (d), 54 Stat. 1167).

Subsection (b) of said section 746 of title 8 is the authority for inserting "or a copy thereof" after "citizenship."

Changes were made in phraseology.

§ 1429. Penalties for neglect or refusal to answer subpena

Any person who has been subpenaed under the provisions of subsection (d) of section 336 of the Immigration and Nationality Act to appear at the final hearing of a petition for naturalization, and who shall neglect or refuse to so appear and to testify, if in the power of such person to do so, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(Added June 27, 1952, c. 477, Title IV, § 402(b), 66 Stat. 276, and amended Dec. 29, 1981, Pub.L. 97–116, § 18(u)(1), 95 Stat. 1621.)

References in Text. Subsection (d) of section 336 of the Immigration and Nationality Act, referred to in text, is classified to section 1447(d) of Title 8, U.S.C.A., Aliens and Nationality.

CHAPTER 71—OBSCENITY

Sec.

1461. Mailing obscene or crime-inciting matter.
1462. Importation or transportation of obscene matters.
1463. Mailing indecent matter on wrappers or envelopes.
1464. Broadcasting obscene language.
1465. Transportation of obscene matters for sale or distribution.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of Title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

(As amended June 28, 1955, c. 190, §§ 1, 2, 69 Stat. 183; Aug. 28, 1958, Pub.L. 85-796, § 1, 72 Stat. 962; Jan. 8, 1971, Pub.L. 91-662, §§ 3, 5(b), 6(3), 84 Stat. 1973, 1974.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 334 (Mar. 4, 1909, ch. 321, § 211, 35 Stat. 1129; Mar. 4, 1911, ch. 241, § 2, 36 Stat. 1339).

The attention of Congress is invited to the following decisions of the Federal courts construing this section and section 1462 of this title.

In *Youngs Rubber Corporation, Inc. v. C.I. Lee & Co., Inc.*, C.C.A.1930, 45 F.2d 103, it was said that the word "adapted" as used in this section and in section 1462 of this title, the latter relating to importation and transportation of obscene matter, is not to be construed literally, the more reasonable interpretation being to construe the whole phrase "designed, adapted or intended" as requiring "an intent on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes." The court pointed out that, taken literally, the language of these sections would seem to forbid the transportation by mail or common carrier of anything "adapted," in the sense of being suitable or fitted, for preventing conception or for any indecent or immoral purpose, "even though the article might also be capable of legitimate uses and the sender in good faith supposed that it would be used only legitimately. Such a construction would prevent mailing to or by a physician of any drug or mechanical device 'adapted' for contraceptive or abortifacient uses, although the physician desired to use or to prescribe it for proper medical purposes. The intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress. Section 334 [this section] forbids also the mailing of obscene books and writings; yet it has never been thought to bar from the mails medical writings sent to or by physicians for proper purposes, though of a character which would render them highly indecent if sent [sic] broadcast to all classes of persons." In *United States v. Nicholas*, C.C.A. 1938, 97 F.2d 510, ruling directly on this point, it was held that the importation or sending through the mails of contraceptive articles or publications is not forbidden absolutely, but only when such articles or publications are unlawfully employed. The same rule was followed in *Davis* v. *United States*, C.C.A.1933, 62 F.2d 473, quoting the obiter opinion from *Youngs Rubber Corporation* v. *C. I. Lee & Co., supra* and holding that the intent of the person mailing a circular conveying information for preventing conception that the article described therein should be used for condemned purposes was necessary for a conviction; also that this section must be given a reasonable construction. (See also *United States* v. *One Package*, C.C.A.1936, 86 F.2d 737.)

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

§ 1462. Importation or transportation of obscene matters

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, pa-

per, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

(As amended May 27, 1950, c. 214, § 1, 64 Stat. 194; Aug. 28, 1958, Pub.L. 85–796, § 2, 72 Stat. 962; Jan. 8, 1971, Pub.L. 91–662, § 4, 84 Stat. 1973.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 396 (Mar. 4, 1909, ch. 321, § 245, 35 Stat. 1138; June 5, 1920, ch. 268, 41 Stat. 1060).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "in interstate or foreign commerce" were substituted for ten lines of text without loss of meaning. (See definitive section 10 of this title.)

(See reviser's note under section 1461 of this title.)

Minor changes in phraseology were made.

§ 1463. Mailing indecent matter on wrappers or envelopes

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(13), 84 Stat. 778.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C. 1940 ed. § 335 (Mar. 4, 1909, ch. 321, § 212, 35 Stat. 1129.)

Said section 335 of title 18, U.S.C., 1940 ed., was incorporated in this section and section 1718 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes were made in phraseology.

§ 1464. Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on sections 326 and 501 of title 47, U.S.C., 1940 ed., Telegraphs, Telephones, and Radio-telegraphs (June 19, 1934, ch. 652, §§ 326, 501, 48 Stat. 1091, 1100).

Section consolidates last sentence of section 326 with penalty provision of section 501 both of title 47, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Section 501 of title 47, U.S.C., 1940 ed., is to remain, also, in said title 47, as it relates to other sections therein.

§ 1465. Transportation of obscene matters for sale or distribution

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items describ-

ed herein which were found in the possession or under the immediate control of such person at the time of his arrest.

(Added June 28, 1955, c. 190, § 3, 69 Stat. 183.)

References in Text. "This Act," referred to in text, means Act June 28, 1955, c. 190, 69 Stat. 183.

CHAPTER 73—OBSTRUCTION OF JUSTICE

Sec.
1501. Assault on process server.
1502. Resistance to extradition agent.
1503. Influencing or injuring officer or juror generally.
1504. Influencing juror by writing.
1505. Obstruction of proceedings before departments, agencies, and committees.
1506. Theft or alteration of record or process; false bail.
1507. Picketing or parading.
1508. Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting.
1509. Obstruction of court orders.
1510. Obstruction of criminal investigations.
1511. Obstruction of State or local law enforcement.
1512. Tampering with a witness, victim, or an informant.
1513. Retaliating against a witness, victim, or an informant.
1514. Civil action to restrain harassment of a victim or witness.
1515. Definitions for certain provisions.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1501. Assault on process server

Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States, or United States commissioner; or

Whoever assaults, beats, or wounds any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process—

Shall, except as otherwise provided by law, be fined not more than $300 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 245 (Mar. 4, 1909, ch. 321, § 140, 35 Stat. 1114).

The phrase "Except as otherwise expressly provided by law" was inserted because sections 2231, 2332, and 2233 of this title provide greater penalties for obstructing service of search warrants.

Mandatory provisions were rephrased in the alternative.

Minor changes were made in phraseology.

Change of Name. United States commissioners, referred to in text, were replaced by United States magistrates pursuant to Pub.L. 90–578, Oct. 17, 1968, 82 Stat. 1118. See section 631 et seq. of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

§ 1502. Resistance to extradition agent

Whoever knowingly and willfully obstructs, resists, or opposes an extradition agent of the United States in the execution of his duties, shall be fined not more than $300 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 661 (R.S. 5277).

Said section 661 of title 18, U.S.C., 1940 ed., was incorporated in this section and section 752 of this title.

Words "an extradition agent of the United States" were substituted for "such agent" which was referred to in sections 3182 et seq. of this title.

A fine of "$300" was substituted for "$1,000" as the mandatory maximum to harmonize with similar offenses in this chapter. (See section 1501 of this title.)

Punishment provision was rephrased in the alternative.

§ 1503. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Oct. 12, 1982, Pub.L. 97–291, § 4(c), 96 Stat. 1253.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 241 (Mar. 4, 1909, ch. 321, § 135, 35 Stat. 1113; June 8, 1945, ch. 178, § 1, 59 Stat. 234).

The phrase "other committing magistrate" was substituted for "officer acting as such commissioner" in order to clarify meaning.

Minor changes were made in phraseology.

Change of Name. United States commissioners, referred to in text, were replaced by United States magistrates pursuant to Pub.L. 90–578, Oct. 17, 1968, 82 Stat. 1118. See section 631 et seq. of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

§ 1504. Influencing juror by writing

Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both.

Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 243 (Mar. 4, 1909, ch. 321, § 137, 35 Stat. 1113.)

Last paragraph was added to remove the possibility that a proper request to appear before a grand jury might be construed as a technical violation of this section.

Minor changes were made in phraseology.

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Sept. 19, 1962, Pub.L. 87–664, § 6(a), 76 Stat. 551; Oct. 15, 1970, Pub.L. 91–452, Title IX, § 903, 84 Stat. 947; Sept. 30, 1976, Pub.L. 94–435, Title I, § 105, 90 Stat. 1389; Oct. 12, 1982, Pub.L. 97–291, § 4(d), 96 Stat. 1253.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 241a (Mar. 4, 1909, ch. 321, § 135a, as added Jan. 13, 1940, ch. 1, 54 Stat. 13; June 8, 1945, ch. 178, § 2, 59 Stat. 234).

Word "agency" was substituted for the words "independent establishment, board, commission" in two instances to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

Minor changes were made in phraseology.

References in Text. The Antitrust Civil Process Act, referred to in text, is classified generally to section 1311 et seq. of Title 15, U.S.C.A., Commerce and Trade.

§ 1506. Theft or alteration of record or process; false bail

Whoever feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect; or

Whoever acknowledges, or procures to be acknowledged in any such court, any recognizance, bail, or judgment, in the name of any other person not privy or consenting to the same—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 233 (Mar. 4, 1909, ch. 321, § 127, 35 Stat. 1111).

The term of imprisonment was reduced from 7 to 5 years, to conform the punishment with like ones for similar offenses. (See section 1503 of this title.)

Minor changes were made in phraseology.

§ 1507. Picketing or parading

Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

(Added Sept. 23, 1950, c. 1024, Title I, § 31(a), 64 Stat. 1018.)

§ 1508. Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting

Whoever knowingly and willfully, by any means or device whatsoever—

(a) records, or attempts to record, the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating or voting; or

(b) listens to or observes, or attempts to listen to or observe, the proceedings of any grand or petit jury of which he is not a member in any court of the United States while such jury is deliberating or voting—

shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Nothing in paragraph (a) of this section shall be construed to prohibit the taking of notes by a grand or petit juror in any court of the United States in connection with and solely for the purpose of assisting him in the performance of his duties as such juror.

(Added Aug. 2, 1956, c. 879, § 1, 70 Stat. 935.)

§ 1509. Obstruction of court orders

Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime.

(Added Pub.L. 86-449, Title I, § 101, May 6, 1960, 74 Stat. 86.)

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

(Added Pub.L. 90-123, § 1(a), Nov. 3, 1967, 81 Stat. 362, and amended Pub.L. 97-291, § 4(e), Oct. 12, 1982, 96 Stat. 1253.)

§ 1511. Obstruction of State or local law enforcement

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

(d) Whoever violates this section shall be punished by a fine of not more than $20,000 or imprisonment for not more than five years, or both.

(Added Pub.L. 91–452, Title VIII, § 802(a), Oct. 15, 1970, 84 Stat. 936.)

Congressional Statement of Findings. Section 801 of Pub.L. 91–452 provided that: "The Congress finds that illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof."

Priority of State Laws. Section 811 of Pub.L. 91–452 provided that: "No provision of this title [Title VIII of Pub.L. 91–452] indicates an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of a State or possession, or a political subdivision of a State or possession, on the same subject matter, or to relieve any person of any obligation imposed by any law of any State or possession, or political subdivision of a State or possession."

§ 1512. Tampering with a witness, victim, or an informant

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.

(Added Pub.L. 97–291, § 4(a), Oct. 12, 1982, 96 Stat. 1249.)

Effective Date. Section 9 of Pub.L. 97–291 provided that:

"(a) Except as provided in subsection (b), this Act and the amendments made by this Act [enacting this section and sections 1513, 1514, 1515, 3579, and 3580 of this title, amending sections 1503, 1505, 1510, and 3146 of this title and Rule 32 of the Federal Rules of Criminal Procedure, and enacting provisions set out as notes under this section and sections 1501 and 3579 of this title] shall take

effect on the date of the enactment of this Act [Oct. 14, 1982].

"(b)(1) The amendment made by section 2 of this Act [enacting provisions set out as a note under this section] shall apply to presentence reports ordered to be made on or after March 1, 1983.

"(2) The amendments made by section 5 of this Act [enacting sections 3579 and 3580 of this title] shall apply with respect to offenses occurring on or after January 1, 1983."

Congressional Findings and Declaration of Purposes. Section 2 of Pub.L. 97-291 provided that:

"(a) The Congress finds and declares that:

"(1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.

"(2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim.

"(3) Although the majority of serious crimes falls under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system.

"(4) Under current law, law enforcement agencies must have cooperation from a victim of crime and yet neither the agencies nor the legal system can offer adequate protection or assistance when the victim, as a result of such cooperation, is threatened or intimidated.

"(5) While the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted, or a court date is changed.

"(6) The victim and witness who cooperate with the prosecutor often find that the transportation, parking facilities, and child care services at the court are unsatisfactory and they must often share the pretrial waiting room with the defendant or his family and friends.

"(7) The victim may lose valuable property to a criminal only to lose it again for long periods of time to Federal law enforcement officials, until the trial and sometimes and [sic] appeals are over; many times that property is damaged or lost, which is particularly stressful for the elderly or poor.

"(b) The Congress declares that the purposes of this Act [enacting this section and sections 1513, 1514, 1515, 3579, and 3580 of this title, amending sections 1503, 1505, 1510, and 3146 of this title and Rule 32 of the Federal Rules of Criminal Procedure, and enacting provisions set out as notes under this section and section 3579 of this title] are—

"(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;

"(2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and

"(3) to provide a model for legislation for State and local governments."

Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System. Section 6 of Pub.L. 97-291, as amended Pub.L. 98-473, § 1408(b), Oct. 12, 1984, 98 Stat. 2177, provided that:

"(a) Within two hundred and seventy days after the date of enactment of this Act [Oct. 14, 1982], the Attorney General shall develop and implement guidelines for the Department of Justice consistent with the purposes of this Act [see note above]. In preparing the guidelines the Attorney General shall consider the following objectives:

"(1) **Services to victims of crime.**—Law enforcement personnel should ensure that victims routinely receive emergency social and medical services as soon as possible and are given information on the following—

"(A) availability of crime victim compensation (where applicable);

"(B) community-based victim treatment programs;

"(C) the role of the victim in the criminal justice process, including what they can expect from the system as well as what the system expects from them; and

"(D) stages in the criminal justice process of significance to a crime victim, and the manner in which information about such stages can be obtained.

"(2) **Notification of availability of protection.**—A victim or witness should routinely receive information on steps that law enforcement officers and attorneys for the Government can take to protect victims and witnesses from intimidation.

"(3) **Scheduling changes.**—All victims and witnesses who have been scheduled to attend criminal justice proceedings should either be notified as soon as possible of any scheduling changes which will affect their appearances or have available a system for alerting witnesses promptly by telephone or otherwise.

"(4) **Prompt notification to victims of serious crimes.**—Victims, witnesses, relatives of those victims and witnesses who are minors, and relatives of homicide victims should, if such persons provide the appropriate official with a current address and telephone number, receive prompt advance notification, if possible, of—

"(A) the arrest of an accused;

"(B) the initial appearance of an accused before a judicial officer;

"(C) the release of the accused pending judicial proceedings; and

"(D) proceedings in the prosecution and punishment of the accused (including entry of a plea of guilty, trial, sentencing, and, where a term of imprisonment is imposed, a hearing to determine a parole release date and the release of the accused from such imprisonment).

"(5) **Consultation with victim.**—The victim of a serious crime, or in the case of a minor child or a homicide, the family of the victim, should be consulted by the attorney for the Government in order to obtain the views of the victim or family about the disposition of any Federal criminal case brought as a result of such crime, including the views of the victim or family about—

"(A) dismissal;

"(B) release of the accused pending judicial proceedings;

"(C) plea negotiations; and

"(D) pretrial diversion program.

"(6) **Separate waiting area.**—Victims and other prosecution witnesses should be provided prior to court appearance a waiting area that is separate from all other witnesses.

"(7) **Property return.**—Law enforcement agencies and prosecutor should promptly return victim's property held for evidentiary purposes unless there is a compelling law enforcement reason for retaining it.

"(8) **Notification to employer.**—A victim or witness who so requests should be assisted by law enforcement agencies and attorneys for the Government in informing employers that the need for victim and witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work. A victim or witness who, as a direct result of a crime or of cooperation with law enforcement agencies or attorneys for the Government, is subjected to serious financial strain, should be assisted by such agencies and attorneys in explaining to creditors the reason for such serious financial strain.

"(9) **Training by federal law enforcement training facilities.**—Victim assistance education and training should be offered to persons taking courses at Federal law enforcement training facilities and attorneys for the Government so that victims may be promptly, properly, and completely assisted.

"(10) **General victim assistance.**—The guidelines should also ensure that any other important assistance to victims and witnesses, such as the adoption of transportation, parking, and translator services for victims in court be provided.

"(b) Nothing in this title [probably means Act] shall be construed as creating a cause of action against the United States.

"(c) The Attorney General shall assure that all Federal law enforcement agencies outside of the Department of Justice adopt guidelines consistent with subsection (a) of this section."

[Amendment by Pub.L. 98-473 effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98-473.]

§ 1513. Retaliating against a witness, victim, or an informant

(a) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) There is extraterritorial Federal jurisdiction over an offense under this section.

(Added Pub.L. 97-291, § 4(a), Oct. 12, 1982, 96 Stat. 1250.)

§ 1514. Civil action to restrain harassment of a victim or witness

(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.

(2)(A) A temporary restraining order may be issued under this section without written or oral notice to the adverse party or such party's attorney in a civil action under this section if the court finds, upon written certification of facts by the attorney for the Government, that such notice should not be required and that there is a reasonable probability that the Government will prevail on the merits.

(B) A temporary restraining order issued without notice under this section shall be endorsed with the date and hour of issuance and be filed forthwith in the office of the clerk of the court issuing the order.

(C) A temporary restraining order issued under this section shall expire at such time, not to exceed 10 days from issuance, as the court directs; the court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to 10 days or for such longer period agreed to by the adverse party.

(D) When a temporary restraining order is issued without notice, the motion for a protective

order shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character, and when such motion comes on for hearing, if the attorney for the Government does not proceed with the application for a protective order, the court shall dissolve the temporary restraining order.

(E) If on two days notice to the attorney for the Government or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(F) A temporary restraining order shall set forth the reasons for the issuance of such order, be specific in terms, and describe in reasonable detail (and not by reference to the complaint or other document) the act or acts being restrained.

(b)(1) A United States district court, upon motion of the attorney for the Government, shall issue a protective order prohibiting harassment of a victim or witness in a Federal criminal case if the court, after a hearing, finds by a preponderance of the evidence that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.

(2) At the hearing referred to in paragraph (1) of this subsection, any adverse party named in the complaint shall have the right to present evidence and cross-examine witnesses.

(3) A protective order shall set forth the reasons for the issuance of such order, be specific in terms, describe in reasonable detail (and not by reference to the complaint or other document) the act or acts being restrained.

(4) The court shall set the duration of effect of the protective order for such period as the court determines necessary to prevent harassment of the victim or witness but in no case for a period in excess of three years from the date of such order's issuance. The attorney for the Government may, at any time within ninety days before the expiration of such order, apply for a new protective order under this section.

(c) As used in this section—

(1) the term "harassment" means a course of conduct directed at a specific person that—

(A) causes substantial emotional distress in such person; and

(B) serves no legitimate purpose; and

(2) the term "course of conduct" means a series of acts over a period of time, however short, indicating a continuity of purpose.

(Added Pub.L. 97–291, § 4(a), Oct. 12, 1982, 96 Stat. 1250.)

§ 1515. Definitions for certain provisions

As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, or a Federal grand jury;

(B) a proceeding before the Congress; or

(C) a proceeding before a Federal Government agency which is authorized by law;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title; and

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary.

(Added Pub.L. 97–291, § 4(a), Oct. 12, 1982, 96 Stat. 1252.)

CHAPTER 75—PASSPORTS AND VISAS

Sec.
1541. Issuance without authority.
1542. False statement in application and use of passport.
1543. Forgery or false use of passport.
1544. Misuse of passport.
1545. Safe conduct violation.
1546. Fraud and misuse of visas, permits, and other entry documents.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set as a note under section 3551 of this title.

§ 1541. Issuance without authority

Whoever, acting or claiming to act in any office or capacity under the United States, or a State or possession, without lawful authority grants, issues, or verifies any passport or other instrument in the nature of a passport to or for any person whomsoever; or

Whoever, being a consular officer authorized to grant, issue, or verify passports, knowingly and willfully grants, issues, or verifies any such passport to or for any person not owing allegiance, to the United States, whether a citizen or not—

Shall be fined not more than $500 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on section 219 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (R.S. 4078; June 14, 1902, ch. 1088, § 3, 32 Stat. 386).

The venue provision, which followed the punishment provisions, was omitted as covered by section 3238 of this title.

Changes were made in phraseology.

§ 1542. False statement in application and use of passport

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on section 220 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 15, 1917, ch. 30, title IX, § 2, 40 Stat. 227; Mar. 28, 1940, ch. 72, § 7, 54 Stat. 80).

Mandatory-punishment provision was rephrased in the alternative.

Punishment of five years' imprisonment was substituted for "ten years" to conform with other sections embracing offenses of comparable gravity.

Minor changes were made in phraseology.

§ 1543. Forgery or false use of passport

Whoever falsely makes, forges, counterfeits, mutilates, or alters any passport or instrument purporting to be a passport, with intent that the same may be used; or

Whoever willfully and knowingly uses, or attempts to use, or furnishes to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on section 222 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 15, 1917, ch. 30, title IX, § 4, 40 Stat. 227; Mar. 28, 1940, ch. 72, § 7, 54 Stat. 80).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Mandatory-punishment provision with authorization for added fine in discretion of court was rephrased in the alternative.

Punishment of five years' imprisonment was substituted for "ten years" to conform with other sections embracing offenses of comparable gravity.

Minor changes were made in phraseology.

§ 1544. Misuse of passport

Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or

Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or

Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on section 221 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (June 15, 1917, ch. 30, title IX, § 3, 40 Stat. 227; Mar. 28, 1940, ch. 72, § 7, 54 Stat. 80).

Mandatory-punishment provision rephrased in the alternative.

Punishment of five years' imprisonment was substituted for "ten years" to conform with other sections embracing offenses of comparable gravity.

The phrase "which said rules shall be printed on the passport" was omitted as inconsistent with administrative practice and because the existing rules are too voluminous to be printed on a passport.

Minor changes were made in phraseology.

§ 1545. Safe conduct violation

Whoever violates any safe conduct or passport duly obtained and issued under authority of the United States shall be fined not more than $2,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on section 251 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse (R.S. 4062).

The punishment provision was rewritten to permit the alternative of a fine of not more than $2,000 or imprisonment, or both, instead of imprisonment and fine "at the discretion of the court", to conform with other sections embracing offenses of comparable gravity.

Minor changes were made in phraseology.

§ 1546. Fraud and misuse of visas, permits, and other entry documents

Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(As amended June 27, 1952, c. 477, Title IV, § 402(a), 66 Stat. 275; Oct. 18, 1976, Pub.L. 94-550, § 5, 90 Stat. 2535.)

HISTORICAL AND REVISION NOTES

Based on section 220 of title 8, U.S.C., 1940 ed., Aliens and Nationality (May 26, 1924, ch. 190, § 22, 43 Stat. 165).

Words "upon conviction thereof" were omitted as surplusage since punishment can be imposed only after a conviction.

Fine of $10,000 was reduced to $2,000 to conform with sections embracing offences of comparable gravity.

Minor changes were made in phraseology.

References in Text. The immigration laws, referred to in text, are classified generally to section 1101 et seq. of Title 8, U.S.C.A., Aliens and Nationality.

Transfer of Functions. All functions vested by law in the Attorney General, the Department of Justice, or any other officer or any agency of that Department, with respect to the inspection at regular inspection locations at ports of entry of persons, and documents of persons, entering or leaving the United States, were transferred to the Secretary of the Treasury.

CHAPTER 77—PEONAGE AND SLAVERY

Sec.

1581. Peonage; obstructing enforcement.
1582. Vessels for slave trade.
1583. Enticement into slavery.

Sec.
1584. Sale into involuntary servitude.
1585. Seizure, detention, transportation or sale of slaves.
1586. Service on vessels in slave trade.
1587. Possession of slaves aboard vessel.
1588. Transportation of slaves from United States.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1581. Peonage; obstructing enforcement

(a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(b) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a).

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 444, 445 (Mar. 4, 1909, ch. 321, §§ 269, 270, 35 Stat. 1142).

Section consolidates sections 444 and 445 of said title 18, U.S.C., 1949 ed., with changes in phraseology to amplify and clarify their provisions.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

§ 1582. Vessels for slave trade

Whoever, whether as master, factor, or owner, builds, fits out, equips, loads, or otherwise prepares or sends away any vessel, in any port or place within the United States, or causes such vessel to sail from any such port or place, for the purpose of procuring any person from any foreign kingdom or country to be transported and held, sold, or otherwise disposed of as a slave, or held to service or labor, shall be fined not more than $5,000 or imprisoned not more than seven years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 424 (Mar. 4, 1909, ch. 321, § 249, 35 Stat. 1139).

Words "within the United States" were substituted for "within the jurisdiction of the United States". See section 5 of this title defining "United States".

Provision for division of the fine and its recovery by private person was omitted. (See reviser's note under section 1585 of this title.)

Mandatory-punishment provisions were rephrased in the alternative.

Minor changes were made in phraseology.

§ 1583. Enticement into slavery

Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave; or

Whoever entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 443 (Mar. 4, 1909, ch. 321, § 268, 35 Stat. 1141).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes were made in paragraphing of section.

§ 1584. Sale into involuntary servitude

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 423, 446 (Mar. 4, 1909, ch. 321, §§ 248, 271, 35 Stat. 1139, 1142).

Sections consolidated with changes of phraseology necessary to effect consolidation.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Provisions as to holding of kidnapped persons were omitted as superseded by section 1201 of this title and original text relating to sale or holding to involuntary servitude retained.

Words "within the United States" were substituted for "within the jurisdiction of the United States". (See section 5 of this title defining "United States".)

The punishment provisions were derived from section 446 of title 18, U.S.C., 1940 ed., as more consistent with other sections of this chapter.

The requirement of section 423 of title 18, U.S.C., 1940 ed., for payment of one-half the fine "for the use of the person prosecuting the indictment to effect" was omitted as meaningless. (See also reviser's note under section 1585 of this title.)

Mandatory-punishment provisions were rephrased in the alternative.

Minor changes were made in phraseology.

§ 1585. Seizure, detention, transportation or sale of slaves

Whoever, being a citizen or resident of the United States and a member of the crew or ship's company of any foreign vessel engaged in the slave trade, or whoever, being of the crew or ship's company of any vessel owned in whole or in part, or navigated for, or in behalf of, any citizen of the United States, lands from such vessel, and on any foreign shore seizes any person with intent to make that person a slave, or decoys, or forcibly brings, carries, receives, confines, detains or transports any person as a slave on board such vessel, or, on board such vessel, offers or attempts to sell any such person as a slave, or on the high seas or anywhere on tide water, transfers or delivers to any other vessel any such person with intent to make such person a slave, or lands or delivers on shore from such vessel any person with intent to sell, or having previously sold, such person as a slave, shall be fined not more than $5,000 or imprisoned not more than seven years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 421, 422, 425 (Mar. 4, 1909, ch. 321, §§ 246, 247, 250, 35 Stat. 1138, 1139).

Section consolidates and restores three basic sections (act May 25, 1820, ch. 113, §§ 4, 5, 3 Stat. 600, 601; act Apr. 20, 1818, ch. 91, § 4, 3 Stat. 451). As reenacted in the Revised Statutes, such sections were extended and broadened beyond such basic acts. The language at the beginning, "being a citizen or resident of the United States", was inserted from said section 425 of title 18, U.S.C., 1940 ed., as enacted originally. While the basic provisions of said sections 421 and 422 are thus broadened, their application as enacted in the 1909 Criminal Code is narrowed.

Designation in said section 421 of title 18, U.S.C., 1940 ed., of offender as a "pirate" was omitted as unnecessary. The punishment provision of section 1582 of this title (incorporated by reference in said section 425) has been adopted as consistent with other slave-trade statutes rather than the life-imprisonment penalty contained in said sections 421 and 422 of title 18, U.S.C., 1940 ed. However, the requirement in section 1582 of this title that one-half the fine be for the "use of the person prosecuting the indictment to effect" was omitted as meaningless.

Mandatory-punishment provisions were rephrased in the alternative.

§ 1586. Service on vessels in slave trade

Whoever, being a citizen or resident of the United States, voluntarily serves on board of any vessel employed or made use of in the transportation of slaves from any foreign country or place to another, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 427 (Mar. 4, 1909, ch. 321, § 252, 35 Stat. 1139).

Mandatory-punishment provisions were rephrased in the alternative.

§ 1587. Possession of slaves aboard vessel

Whoever, being the captain, master, or commander of any vessel found in any river, port, bay, harbor, or on the high seas within the jurisdiction of the United States, or hovering off the coast thereof, and having on board any person for the purpose of selling such person as a slave, or with intent to land such person for such purpose, shall be fined not more than $10,000 or imprisoned not more than four years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 426 (Mar. 4, 1909, ch. 321, § 251, 35 Stat. 1139).

Mandatory-punishment provisions were rephrased in the alternative.

Minor change was made in phraseology.

§ 1588. Transportation of slaves from United States

Whoever, being the master or owner or person having charge of any vessel, receives on board any other person with the knowledge or intent that such person is to be carried from any place within the United States to any other place to be held or sold as a slave, or carries away from any place within the United States any such person with the intent that he may be so held or sold as a slave, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 428 (Mar. 4, 1909, ch. 321, § 253, 35 Stat. 1139).

Words "subject to the jurisdiction of" which appeared twice in this section were omitted and "within" substituted in view of section 5 of this title defining "United States".

CHAPTER 79—PERJURY

Sec.
1621. Perjury generally.
1622. Subornation of perjury.
1623. False declarations before grand jury or court.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which

a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

(As amended Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995; Oct. 18, 1976, Pub.L. 94-550, § 2, 90 Stat. 2534.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 231, 629 (Mar. 4, 1909, ch. 321, § 125, 35 Stat. 1111; June 15, 1917, ch. 30, title XI, § 19, 40 Stat. 230).

Words "except as otherwise expressly provided by law" were inserted to avoid conflict with perjury provisions in other titles where the punishment and application vary.

More than 25 additional provisions are in the code. For construction and application of several such sections, see *Behrle* v. *United States* (App.D.C.1938, 100 F.2d 714), *United States* v. *Hammer* (D.C.N.Y., 1924, 299 F. 1011, affirmed, 6 F.2d 786), *Rosenthal* v. *United States* (1918, 248 F. 684, 160 C.C.A. 584), cf. *Epstein* v. *United States* (1912, 196 F. 354, 116 C.C.A. 174, certiorari denied 32 S.Ct. 527, 223 U.S. 731, 56 L.Ed. 634).

Mandatory punishment provisions were rephrased in the alternative.

Minor verbal changes were made.

§ 1622. Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 232, (Mar. 4, 1909, ch. 321, § 126, 35 Stat. 1111).

The punishment prescribed in section 1621 of this title was substituted for the reference thereto.

Minor change was made in phraseology.

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

(Added Pub.L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932, and amended Pub.L. 94-550, § 6, Oct. 18, 1976, 90 Stat. 2535.)

CHAPTER 81—PIRACY AND PRIVATEERING

Sec.
1651. Piracy under law of nations.
1652. Citizens as pirates.
1653. Aliens as pirates.
1654. Arming or serving on privateers.
1655. Assault on commander as piracy.
1656. Conversion or surrender of vessel.
1657. Corruption of seamen and confederating with pirates.
1658. Plunder of distressed vessel.
1659. Attack to plunder vessel.
1660. Receipt of pirate property.
1661. Robbery ashore.

Historical and Revision Notes

In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion. Such a task may be regarded as beyond the scope of this project. The present revision is, therefore, confined to the making of some obvious and patent corrections. It is recommended, however, that at some opportune time in the near future, the subject of piracy be entirely reconsidered and the law bearing on it modified and restated in accordance with the needs of the times.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1651. Piracy under law of nations

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 481 (Mar. 4, 1909, ch. 321, § 290, 35 Stat. 1145).

§ 1652. Citizens as pirates

Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person, is a pirate, and shall be imprisoned for life.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 495 (Mar. 4, 1909, ch. 321, § 304, 35 Stat. 1147).

Words "Notwithstanding the pretense of such authority," were omitted as surplusage.

§ 1653. Aliens as pirates

Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 496 (Mar. 4, 1909, ch. 321, § 305, 35 Stat. 1147).

Minor change was made in phraseology.

§ 1654. Arming or serving on privateers

Whoever, being a citizen of the United States, without the limits thereof, fits out and arms, or attempts to fit out and arm or is concerned in furnishing, fitting out, or arming any private vessel of war or privateer, with intent that such vessel shall be employed to cruise or commit hostilities upon the citizens of the United States or their property; or

Whoever takes the command of or enters on board of any such vessel with such intent; or

Whoever purchases any interest in any such vessel with a view to share in the profits thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 494 (Mar. 4, 1909, ch. 321, § 303, 35 Stat. 1147).

Reference to persons procuring or aiding was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Mandatory punishment provisions were rephrased in the alternative.

The last sentence relating to venue was omitted as unnecessary in view of the general provision to the same effect in section 3238 of this title.

Minor changes were made in phraseology and arrangement.

§ 1655. Assault on commander as piracy

Whoever, being a seaman, lays violent hands upon his commander, to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 485 (Mar. 4, 1909, ch. 321, § 294, 35 Stat. 1146).

A minor verbal change was made.

§ 1656. Conversion or surrender of vessel

Whoever, being a captain or other officer or mariner of a vessel upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, piratically or feloniously runs away with such vessel, or with any goods or merchandise thereof, to the value of $50 or over; or

Whoever yields up such vessel voluntarily to any pirate—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 497 (Mar. 4, 1909, ch. 321, § 306, 35 Stat. 1148).

Minor changes were made in phraseology.

§ 1657. Corruption of seamen and confederating with pirates

Whoever attempts to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or any goods, wares, or merchandise, or to turn pirate or to go over to or confederate with pirates, or in any wise to trade with any pirate, knowing him to be such; or

Whoever furnishes such pirate with any ammunition, stores, or provisions of any kind; or

Whoever fits out any vessel knowingly and, with a design to trade with, supply, or correspond with any pirate or robber upon the seas; or

Whoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery; or

Whoever, being a seaman, confines the master of any vessel—

Shall be fined not more than $1,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 498 (Mar. 4, 1909, ch. 321, § 307, 35 Stat. 1148).

Mandatory punishment provisions were rephrased in the alternative.

Minor changes were made in phraseology.

§ 1658. Plunder of distressed vessel

(a) Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

(b) Whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or

Whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger or distress or shipwreck—

Shall be imprisoned not less than ten years and may be imprisoned for life.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 488 (Mar. 4, 1909, ch. 321, § 297, 35 Stat. 1146).

Mandatory punishment provision in subsection (a) was rephrased in the alternative.

Minor changes were made in phraseology.

§ 1659. Attack to plunder vessel

Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 489 (Mar. 4, 1909, ch. 321, § 298, 35 Stat. 1147).

Mandatory punishment provisions were rephrased in the alternative.

§ 1660. Receipt of pirate property

Whoever, without lawful authority, receives or takes into custody any vessel, goods, or other property, feloniously taken by any robber or pirate against the laws of the United States, knowing the same to have been feloniously taken, shall be imprisoned not more than ten years.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 552 (Mar. 4, 1909, ch. 321, § 334, 35 Stat. 1152).

Provision relating to concealment of pirate and words "is an accessory after the fact to such robbery or piracy" were omitted in view of definitive section 3 of this title.

§ 1661. Robbery ashore

Whoever, being engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore, is a pirate, and shall be imprisoned for life.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 493 (Mar. 4, 1909, ch. 321, § 302, 35 Stat. 1147).

Transposition of several words was made.

CHAPTER 83—POSTAL SERVICE

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Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1691. Laws governing postal savings

All the safeguards provided by law for the protection of public moneys, and all statutes relating to the embezzlement, conversion, improper handling, retention, use, or disposal of postal and money-order funds, false returns of postal and money-order business, forgery, counterfeiting, alteration, improper use or handling of postal and money-order blanks, forms, vouchers, accounts, and records, and the dies, plates, and engravings therefor, with the punishments provided for such offenses are extended and made applicable to postal savings depository business and funds and related matters.

HISTORICAL AND REVISION NOTES

Based on section 765 of title 39, U.S.C., 1940 ed., The Postal Service (June 25, 1910, ch. 386, § 15, 36 Stat. 818).

Changes of phraseology were made without change of substance.

§ 1692. Foreign mail as United States mail

Every foreign mail, while being transported across the territory of the United States under authority of law, is mail of the United States, and any depredation thereon, or offense in respect thereto, shall be punishable as though it were United States mail.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 359 (Mar. 4, 1909, ch. 321, § 229, 35 Stat. 1134).

Minor changes were made in phraseology and obvious surplusage omitted.

§ 1693. Carriage of mail generally

Whoever, being concerned in carrying the mail, collects, receives, or carries any letter or packet, contrary to law, shall be fined not more than $50 or imprisoned not more than thirty days, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 303 (Mar. 4, 1909, ch. 321, § 180, 35 Stat. 1123).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

§ 1694. Carriage of matter out of mail over post routes

Whoever, having charge or control of any conveyance operating by land, air, or water, which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than $50.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 307 (Mar. 4, 1909, ch. 321, § 184, 35 Stat. 1124).

Words "by land, air, or water" were substituted for "stagecoach, railway car, steamboat" with necessary minor changes in phraseology.

Enumeration of persons having charge was omitted as unnecessary.

§ 1695. Carriage of matter out of mail on vessels

Whoever carries any letter or packet on board any vessel which carries the mail, otherwise than in such mail, shall, except as otherwise provided by law, be fined not more than $50 or imprisoned not more than thirty days, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 308 (Mar. 4, 1909, ch. 321, § 185, 35 Stat. 1124).

The words "thirty days" were substituted for "one month," to make the term of imprisonment more definite and to conform to other comparable sections. (See section 1693 of this title.)

Minor changes were made in phraseology.

§ 1696. Private express for letters and packets

(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

This section shall not prohibit any person from receiving and delivering to the nearest post office, postal car, or other authorized depository for mail matter any mail matter properly stamped.

(b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof, or deposits at any appointed place, for the purpose of being so transmitted any letter or packet, shall be fined not more than $50.

(c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger, the requirements of section 601 of title 39, shall be observed as to each piece.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(14), 84 Stat. 778.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 304, 306, 309 (Mar. 4, 1909, ch. 321, §§ 181, 183, 186, 35 Stat. 1123, 1124; June 22, 1934, ch. 716, 48 Stat. 1207).

Section consolidates sections 304, 306, and 309 of title 18, U.S.C., 1940 ed. Reference to persons causing, procuring, aiding or assisting was omitted as such persons are principals under section 2 of this title.

Minor changes were made in phraseology.

§ 1697. Transportation of persons acting as private express

Whoever, having charge or control of any conveyance operating by land, air, or water, knowingly conveys or knowingly permits the conveyance of any person acting or employed as a private express for the conveyance of letters or packets, and actually in possession of the same for the purpose of conveying them contrary to law, shall be fined not more than $150.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 305 (Mar. 4, 1909, ch. 321, § 182, 35 Stat. 1124).

Same changes were made as in section 1694 of this title.

§ 1698. Prompt delivery of mail from vessel

Whoever, having charge or control of any vessel passing between ports or places in the United States, and arriving at any such port or place where there is a post office, fails to deliver to the postmaster or at the post office, within three hours after his arrival, if in the day time, and if at night, within two hours after the next sunrise, all letters and packages brought by him or within his power or control and not relating to the cargo, addressed to or destined for such port or place, shall be fined not more than $150.

For each letter or package so delivered he shall receive two cents unless the same is carried under contract.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 323 (Mar. 4, 1909, ch. 321, § 200, 35 Stat. 1126).

Changes were made in phraseology.

§ 1699. Certification of delivery from vessel

No vessel arriving within a port or collection district of the United States shall be allowed to make entry or break bulk until all letters on board are delivered to the nearest post office, except where waybilled for discharge at other ports in the United States at which the vessel is scheduled to call and the Postal Service does not determine that unreasonable delay in the mails will occur, and the master or other person having charge or control thereof has signed and sworn to the following declaration before the collector or other proper customs officer:

I, A. B., master _____, of the _____, arriving from _____, and now lying in the port of _____, do solemnly swear (or affirm) that I have to the best of my knowledge and belief delivered to the post office at _____ every letter and every bag, packet, or parcel of letters on board the said vessel during her last voyage, or in my possession or under my power or control, except where waybilled for discharge at other ports in the United States at which the said vessel is scheduled to call and which the Postal Service has not determined will be unreasonably delayed by remaining on board the said vessel for delivery at such ports.

Whoever, being the master or other person having charge or control of such vessel, breaks bulk before he has arranged for such delivery or onward carriage, shall be fined not more than $100.

(As amended July 3, 1952, c. 553, 66 Stat. 325; Aug 12, 1970, Pub.L. 91-375, § 6(j)(15), 84 Stat. 778.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 327 (Mar. 4, 1909, ch. 321, § 204, 35 Stat. 1127).

Minor changes were made in phraseology.

Transfer of Functions. All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise in the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, to be terminated not later than Dec. 31, 1966. All functions of the offices so eliminated were already vested in the Secretary of the Treasury.

§ 1700. Desertion of mails

Whoever, having taken charge of any mail, voluntarily quits or deserts the same before he has delivered it into the post office at the termination of the route, or to some known mail carrier, messenger, agent, or other employee in the Postal Service authorized to receive the same, shall be fined not more than $500 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 322 (Mar. 4, 1909, ch. 321, § 199, 35 Stat. 1126).

Minor changes were made in phraseology.

§ 1701. Obstruction of mails generally

Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 324, 325 (Mar. 4, 1909, ch. 321, §§ 201, 202, 35 Stat. 1127).

Sections 324 and 325 of title 18, U.S.C., 1940 ed., were consolidated with changes of phraseology necessary to effect consolidation.

Words "carriage, horse, driver or", "car, steamboat", and "or vessel" were omitted as covered by "any carrier or conveyance".

The punishment provision is derived from said section 324 rather than from section 325 which provided only a fine of not more than $100 and related only to ferrymen.

§ 1702. Obstruction of correspondence

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 317 (Mar. 4, 1909, ch. 321, § 194, 35 Stat. 1125; Feb. 25, 1925, ch. 318, 43 Stat. 977; Aug. 26, 1935, ch. 693, 49 Stat. 867; Aug. 7, 1939, ch. 557, 53 Stat. 1256).

Section 317 of said title 18, U.S.C., 1940 ed., was incorporated in this and section 1708 of this title.

Minor changes were made in phraseology.

§ 1703. Delay or destruction of mail or newspapers

(a) Whoever, being a Postal Service officer or employee, unlawfully secretes, destroys, detains, delays, or opens any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or the Postal Service, shall be fined not more than $500 or imprisoned not more than five years, or both.

(b) Whoever, being a Postal Service officer or employee, improperly detains, delays, or destroys any newspaper, or permits any other person to detain, delay, or destroy the same, or opens, or permits any other person to open, any mail or package of newspapers not directed to the office where he is employed; or

Whoever, without authority, opens, or destroys any mail or package of newspapers not directed to him, shall be fined not more than $100 or imprisoned not more than one year, or both.

(As amended May 24, 1949, c. 139, § 37, 63 Stat. 95; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(16), 84 Stat. 778.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., §§ 318, 319 (Mar. 4, 1909, ch. 321, §§ 195, 196, 35 Stat. 1125, 1126).

Section consolidated sections 318 and 319 of said title 18, U.S.C., 1940 ed. The embezzlement and theft provisions of each were incorporated in sections 1709 and 1710 of this title.

Minor changes were made in phraseology.

1949 Act

This section [section 37] corrects typographical errors in section 1703 of title 18, U.S.C.

§ 1704. Keys or locks stolen or reproduced

Whoever steals, purloins, embezzles, or obtains by false pretense any key suited to any lock adopted by the Post Office Department or the Postal Service and in use on any of the mails or bags thereof, or any key to any lock box, lock drawer, or other authorized receptacle for the deposit or delivery of mail matter; or

Whoever knowingly and unlawfully makes, forges, or counterfeits any such key, or possesses any such mail lock or key with the intent unlawfully or improperly to use, sell, or otherwise dispose of the same, or to cause the same to be unlawfully or improperly used, sold, or otherwise disposed of; or

Whoever, being engaged as a contractor or otherwise in the manufacture of any such mail lock or key, delivers any finished or unfinished lock or the interior part thereof, or key, used or designed for use by the department, to any person not duly authorized under the hand of the Postmaster General and the seal of the Post Office Department or the Postal Service, to receive the same, unless the person receiving it is the contractor for furnishing the same or engaged in the manufacture thereof in the manner authorized by the contract, or the agent of such manufacturer—

Shall be fined not more than $500 or imprisoned not more than ten years, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(17), 84 Stat. 778.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 314 (Mar. 4, 1909, ch. 321, § 191, 35 Stat. 1125).

Reference to persons aiding, causing or assisting was omitted. Such persons are principals under section 2 of this title.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 1705. Destruction of letter boxes or mail

Whoever willfully or maliciously injures, tears down or destroys any letter box or other receptacle intended or used for the receipt or delivery of mail on any mail route, or breaks open the same or willfully or maliciously injures, defaces or destroys any mail deposited therein, shall be fined not more than $1,000 or imprisoned not more than three years.

(As amended May 24, 1949, c. 139, § 38, 63 Stat. 95.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., § 321 (Mar. 4, 1909, ch. 321, § 198, 35 Stat. 1126; May 18, 1916, ch. 126, § 10, 39 Stat. 162; July 28, 1916, ch. 261, § 1, 39 Stat. 418; May 7, 1934, ch. 220, § 1, 48 Stat. 667).

Words "or shall willfully take or steal such mail from or out of such letter box or other receptacle" were omitted as covered by section 1702 of this title. Prosecutions for theft of mail matter are invariably made under that section whereas this section is used as basis for prosecutions for malicious mischief to mail boxes or receptacles. By Postal Regulations (1928), section 700, paragraph 2, an ordinary letter box is within this section and also section 1702 of this title. *Huebner v. United States* (C.C.A.1928, 28 F.2d 929).

Reference to persons assisting or aiding was omitted. Such persons are principals under definitive section 2 of this title.

Minor changes were made in phraseology.

1949 Act

As amended by this section [section 38] of the bill, section 1705 of title 18, U.S.C., is brought more closely into conformity with the original statute from which it was derived by eliminating an inadvertent reference to a "conveyance" which was not in the original statute. (See S.Rept.No.133, 81st Cong.)

§ 1706. Injury to mail bags

Whoever tears, cuts, or otherwise injures any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or draws or breaks any staple or loosens any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 312 (Mar. 4, 1909, ch. 321, § 189, 35 Stat. 1124).

A fine of "$1,000" was substituted for "$500" thus increasing the maximum to correspond with other comparable sections. (See section 1705 of this title.)

Minor verbal changes were made.

§ 1707. Theft of property used by Postal Service

Whoever steals, purloins, or embezzles any property used by the Postal Service, or appropriates any such property to his own or any other than its proper use, or conveys away any such property to the hindrance or detriment of the public service, shall be fined not more than $1,000 or imprisoned not more than three years, or both; but if the value of such property does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(18), 84 Stat. 778.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 313 (Mar. 4, 1909, ch. 321, § 190, 35 Stat. 1124).

The phrase "used by" was substituted for "in use by or belonging to" in order to limit the application of the section to property used by the Post Office Department. Theft of public property belonging to governmental departments is covered by section 641 of this title.

A fine of "$1,000" was substituted for "$200," thus increasing the maximum to conform with other comparable sections. (See section 1705 of this title.)

The smaller penalty for an offense involving property valued at $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

Minor changes in phraseology were made.

§ 1708. Theft or receipt of stolen mail matter generally

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(As amended May 24, 1949, c. 139, § 39, 63 Stat. 95; July 1, 1952, c. 535, 66 Stat. 314.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., §§ 317, 321 (Mar. 4, 1909, ch. 321, §§ 194, 198, 35 Stat. 1125, 1126; May 18, 1916, ch. 126, § 10, 39 Stat. 162; July 28, 1916, ch. 261, § 1, 39 Stat. 418; Feb. 25, 1925, ch. 318, 43 Stat. 977; May 7, 1934, ch. 220, § 1, 48 Stat. 667; Aug. 26, 1935, ch. 693, 49 Stat. 867; Aug. 7, 1939, ch. 557, 53 Stat. 1256).

Each of these two sections has been divided. Provisions relating to theft or larceny of mail were placed in this section.

Words "letter box, mail receptacle, or any mail route" are from section 321 of title 18, U.S.C., 1940 ed. Such receptacles are authorized depositaries. (See *Rosen v. United States*, N.Y.1917, 38 S.Ct. 148, 245 U.S. 467, 62 L.Ed. 406, and *Foster v. Biddle*, C.C.A.Kan.1926, 14 F.2d 280, involving indictment under section 317 of title 18, U.S.C., 1940 ed.) No cases are reported of prosecutions for mail theft under section 321 of title 18, U.S.C., 1940 ed., which relates primarily to malicious mischief respecting letter boxes.

Language omitted from section 317 of title 18, U.S.C., 1940 ed., and all of section 321 of title 18, U.S.C., 1940 ed., except that above quoted, was incorporated in sections 1702 and 1705 of this title.

Words "or aids in buying, receiving, or concealing" were omitted as unnecessary in view of the definition of principal in section 2 of this title.

The smaller penalty for an offense involving $100 or less was added. (See sections 641 and 645 of this title.)

Minor changes were made in phraseology.

1949 Act

This section [section 39] corrects a typographical error in section 1708 of title 18, U.S.C.

§ 1709. Theft of mail matter by officer or employee

Whoever, being a Postal Service officer or employee, embezzles any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or of the Postal Service; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(19)(A), 84 Stat. 778.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 318 (Mar. 4, 1909, ch. 321, § 195, 35 Stat. 1125).

The provisions of said section 318 of title 18, U.S.C., 1940 ed., were incorporated in this section and section 1703 of this title.

The fine of "$500" was increased to "$2,000" as more proportionate to the imprisonment provision and to conform with other comparable sections. (See sections 1702 and 1708 of this title.)

Changes were made in phraseology.

§ 1710. Theft of newspapers

Whoever, being a Postal Service officer or employee, takes or steals any newspaper or package of newspapers from any post office or from any person having custody thereof, shall be fined not more than $100 or imprisoned not more than one year, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(20), 84 Stat. 778.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 319 (Mar. 4, 1909, ch. 321, § 196, 35 Stat. 1126).

Theft provisions alone are retained in this section. Those relating to other offenses were incorporated in section 1703 of this title.

Words "mail or" following "steals any" were omitted as covered by section 1709 of this title.

Changes were made in phraseology.

§ 1711. Misappropriation of postal funds

Whoever, being a Postal Service officer or employee, loans, uses, pledges, hypothecates, or converts to his own use, or deposits in any bank, or exchanges for other funds or property, except as authorized by law, any money or property coming into his hands or under his control in any manner, in the execution or under color of his office, employment, or service, whether or not the same shall be the money or property of the United States; or fails or refuses to remit to or deposit in the Treasury of the United States or in a designated depository, or to account for or turn over to the proper officer or agent, any such money or property, when required to do so by law or the regulations of the Postal Service, or upon demand or order of the Postal Service, either directly or through a duly authorized officer or agent, is guilty of embezzlement; and every such person, as well as every other person advising or knowingly participating therein, shall be fined in a sum equal to the amount or value of the money or property embezzled or imprisoned not more than ten years, or both; but if the amount or value thereof does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prohibit any Postal Service officer or employee from depositing, under the direction of the Postal Service, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as Postal Service officer or employee, any funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such bank, or through United States disbursing officers, or otherwise, when instructed or required so to do by the Postal Service, for the purpose of remitting surplus funds from one post office to another.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(21), 84 Stat. 778.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 355 (Mar. 4, 1909, ch. 321, § 225, 35 Stat. 1133; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Said section 355 was divided into two sections, this section and section 3498 of this title.

The smaller punishment for an offense involving $100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

Changes of phraseology only were made.

§ 1712. Falsification of postal returns to increase compensation

Whoever, being a Postal Service officer or employee, makes a false return, statement, or account to any officer of the United States, or makes a false entry in any record, book, or account, required by law or the rules or regulations of the Postal Service to be kept in respect of the business or operations of any post office or other branch of the Postal Service, for the purpose of fraudulently increasing his compensation or the compensation of the postmaster or any employee in a post office; or

Whoever, being a Postal Service officer or employee in any post office or station thereof, for the purpose of increasing the emoluments or compensation of his office, induces, or attempts to induce, any person to deposit mail matter in, or forward in any manner for mailing at, the office where such officer or employee is employed, knowing such matter to be properly mailable at another post office—

Shall be fined not more than $500 or imprisoned not more than two years, or both.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(22), 84 Stat. 779.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 329 and on section 172 of title 39, U.S.C., 1940 ed., The Postal Service (Aug. 4, 1886, ch. 901, § 3, 24 Stat. 221; Mar. 4, 1909, ch. 321, § 206, 35 Stat. 1128; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Said sections were consolidated.

The text of the two sections were substantially identical except that said section 172 of title 39, U.S.C., 1940 ed., provided that "whenever, upon evidence deemed satisfactory to him, the Postmaster General shall determine that any such false return has been made, he may, by order, fix absolutely the compensation of the postmaster for such special delivery during any quarter or quarters which he shall deem affected by such false return, and the General Accounting Office shall adjust the postmaster's account accordingly", the words "General Accounting Office" having been substituted for "Auditor" on the authority of the act of June 10, 1921, shown in the credits above. This particular language was omitted because such powers and duties as it prescribes would devolve upon the Postmaster General without legislation and also because said section 172 of Title 39, which was derived from the act of August 4, 1886, shown in the credits above, was impliedly repealed by the general repealing clause of section 341 of the Criminal Code of 1909. Section 208 of that Code contained the provisions which formed the basis for said section 329 of Title 18.

Reference in said section 329 of title 18, U.S.C., 1940 ed., to persons assisting, causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

§ 1713. Issuance of money orders without payment

Whoever, being an officer or employee of the Postal Service, issues a money order without having previously received the money therefor, shall be fined not more than $500.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(23), 84 Stat. 779.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 333 (Mar. 4, 1909, ch. 321, § 210, 35 Stat. 1129).

Minor change was made in phraseology.

§ 1714. Foreign divorce information as nonmailable

Every written or printed card, circular, letter, book, pamphlet, advertisement, or notice of any kind, giving or offering to give information concerning where or how or through whom a divorce may be secured in a foreign country, and designed to solicit business in connection with the procurement thereof, is nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits, for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, shall be fined not more than $5,000 or imprisoned for not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 338c (Aug. 10, 1939, ch. 638, § 1, 53 Stat. 1341).

The word "one" was substituted for "five" in the punishment clause thus bringing the offense within the misdemeanor category and permitting prosecution on information. The 5-year penalty was disproportionate in view of the 2-year penalty in section 1715 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

§ 1715. Firearms as nonmailable; regulations

Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe, for use in connection with their official duty, to officers of the Army, Navy, Air Force, Coast Guard, Marine Corps, or Organized Reserve Corps; to officers of the National Guard

or Militia of a State, Territory, or District; to officers of the United States or of a State, Territory, or District whose official duty is to serve warrants of arrest or commitments; to employees of the Postal Service; to officers and employees of enforcement agencies of the United States; and to watchmen engaged in guarding the property of the United States, a State, Territory, or District. Such articles also may be conveyed in the mails to manufacturers of firearms or bona fide dealers therein in customary trade shipments, including such articles for repairs or replacement of parts, from one to the other, under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, any pistol, revolver, or firearm declared nonmailable by this section, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

(As amended May 24, 1949, c. 139, § 40, 63 Stat. 95; Aug. 12, 1970, Pub.L. 91–375, § 6(j)(24), 84 Stat. 779.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 361 (Feb. 8, 1927, ch. 75, § 1, 44 Stat. 1059; May 15, 1939, ch. 134, 53 Stat. 744; Mar. 7, 1942, ch. 160, 56 Stat. 141).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes were made in phraseology.

1949 ACT

This section [section 40] inserts "Air Force," in section 1715 of title 18, U.S.C., in view of the establishment in 1947 of this separate branch of the armed forces, and substitutes, "Organized" for "Officers' ", preceding "Reserve Corps", to conform to section 2 of title 10, U.S.C., as amended by the act of March 25, 1948 (ch. 157, § 1, 62 Stat. 87), which grouped all reserve branches into a reserve component called the Organized Reserve Corps.

§ 1716. Injurious articles as nonmailable

(a) All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, reptiles, and all explosives, inflammable materials, infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or material which may kill or injure another, or injure the mails or other property, whether or not sealed as first-class matter, are nonmailable matter and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any officer or employee of the Postal Service.

(b) The Postal Service may permit the transmission in the mails, under such rules and regulations as it shall prescribe as to preparation and packing, of any such articles which are not outwardly or of their own force dangerous or injurious to life, health, or property.

(c) The Postal Service is authorized and directed to permit the transmission in the mails, under regulations to be prescribed by it, of live scorpions which are to be used for purposes of medical research or for the manufacture of antivenom. Such regulations shall include such provisions with respect to the packaging of such live scorpions for transmission in the mails as the Postal Service deems necessary or desirable for the protection of Postal Service personnel and of the public generally and for ease of handling by such personnel and by any individual connected with such research or manufacture. Nothing contained in this paragraph shall be construed to authorize the transmission in the mails of live scorpions by means of aircraft engaged in the carriage of passengers for compensation or hire.

(d) The transmission in the mails of poisonous drugs and medicines may be limited by the Postal Service to shipments of such articles from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, cosmetologists, barbers, and veterinarians under such rules and regulations as it shall prescribe.

(e) The transmission in the mails of poisons for scientific use, and which are not outwardly dangerous or of their own force dangerous or injurious to life, health, or property, may be limited by the Postal Service to shipments of such articles between the manufacturers thereof, dealers therein, bona fide research or experimental scientific laboratories, and such other persons who are employees of the Federal, a State, or local government, whose official duties are comprised, in whole or in part, of the use of such poisons, and who are designated by the head of the agency in which they are employed to receive or send such articles, under such rules and regulations as the Postal Service shall prescribe.

(f) All spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind are nonmailable and shall not be deposited in or carried through the mails.

(g) All knives having a blade which opens automatically (1) by hand pressure applied to a button or other device in the handle of the knife, or (2) by

operation of inertia, gravity, or both, are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such knives may be conveyed in the mails, under such regulations as the Postal Service shall prescribe—

(1) to civilian or Armed Forces supply or procurement officers and employees of the Federal Government ordering, procuring, or purchasing such knives in connection with the activities of the Federal Government;

(2) to supply or procurement officers of the National Guard, the Air National Guard, or militia of a State, Territory, or the District of Columbia ordering, procuring, or purchasing such knives in connection with the activities of such organizations;

(3) to supply or procurement officers or employees of the municipal government of the District of Columbia or of the government of any State or Territory, or any county, city, or other political subdivision of a State or Territory, ordering, procuring, or purchasing such knives in connection with the activities of such government; and

(4) to manufacturers of such knives or bona fide dealers therein in connection with any shipment made pursuant to an order from any person designated in paragraphs (1), (2), and (3).

The Postal Service may require, as a condition of conveying any such knife in the mails, that any person proposing to mail such knife explain in writing to the satisfaction of the Postal Service that the mailing of such knife will not be in violation of this section.

(h) Any advertising, promotional, or sales matter which solicits or induces the mailing of anything declared nonmailable by this section is likewise nonmailable unless such matter contains wrapping or packaging instructions which are in accord with regulations promulgated by the Postal Service.

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon, or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, unless in accordance with the rules and regulations authorized to be prescribed by the Postal Service, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, whether or not transmitted in accordance with the rules and regulations authorized to be prescribed by the Postal Service, with intent to kill or injure another, or injure the mails or other property, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion, shall so order.

(As amended May 8, 1952, c. 246, 66 Stat. 67; June 29, 1955, c. 224, 69 Stat. 191; Sept. 2, 1957, Pub.L. 85–268, 71 Stat. 594; Aug. 12, 1958, Pub.L. 85–623, § 5, 72 Stat. 562; Aug. 12, 1970, Pub.L. 91–375, § 6(j)(25), 84 Stat. 779; Dec. 15, 1971, Pub.L. 92–191, § 1, 85 Stat. 647.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 340 (Mar. 4, 1909, ch. 321, § 217, 35 Stat. 1131; May 25, 1920, ch. 196, 41 Stat. 620; Jan. 11, 1929, ch. 53, 45 Stat. 1072; June 19, 1934, ch. 650, 48 Stat. 1063).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

The maximum of "twenty years" was reduced to "ten years" as more consistent with such comparable sections as sections 111 and 1113 of this title.

Minor changes were made in phraseology.

§ 1716A. Nonmailable motor vehicle master keys

Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, any matter declared to be nonmailable by section 3002 of title 39, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

(Added Pub.L. 90–560, § 2(1), Oct. 12, 1968, 82 Stat. 997, and amended Pub.L. 91–375, § 6(j)(26), Aug. 12, 1970, 84 Stat. 780.)

§ 1717. Letters and writings as nonmailable; opening letters [1]

(a) Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, in violation of sections 499, 506, 793, 794, 915, 954, 956, 957, 960, 964, 1017, 1542, 1543, 1544 or 2388 of this title or which contains any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States is

nonmailable and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

(b) Whoever uses or attempts to use the mails or Postal Service for the transmission of any matter declared by this section to be nonmailable, shall be fined not more than $5,000 or imprisoned not more than ten years or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(27), 84 Stat. 780.)

[1] Catchline was not amended to reflect repeal of subsec. (c) in 1960.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 343, 344, 345, 346 (June 15, 1917, ch. 30, title XII, §§ 1-3, title XIII, § 1, 40 Stat. 230, 231; Mar. 28, 1940, ch. 72, § 9, 54 Stat. 80).

Section consolidates said sections 343-345 of title 18, U.S.C., 1940 ed. The provision as to opening letters was incorporated in paragraph (c).

Venue provisions in said section 345 of title 18, U.S.C., 1940 ed., were omitted as covered by section 3237 of this title.

Section 346 of title 18, U.S.C., 1940 ed., defining "United States" was omitted. It is incorporated, however, in section 5 of this title.

References in text to other sections do not include definitive sections. Only those susceptible of violation are cited.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in arrangement, translation, and phraseology.

§ 1718. Libelous matter on wrappers or envelopes

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which is written or printed or otherwise impressed or apparent any delineation, epithet, term, or language of libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, is nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postal Service shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(28), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 335 (Mar. 4, 1909, ch. 321, § 212, 35 Stat. 1129).

Provision relating to mailing indecent and obscene matter was incorporated in chapter "Obscenity," section 1463 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

The punishment provisions were rewritten to make the maximum fine "$1,000" and the maximum imprisonment, "one year" instead of "$5,000" and "five years." The offense is essentially criminal libel which normally is regarded as a misdemeanor. (See New York Penal Code, sections 1340 and 1341.)

Minor verbal changes were made.

§ 1719. Franking privilege

Whoever makes use of any official envelope, label, or indorsement authorized by law, to avoid the payment of postage or registry fee on his private letter, packet, package, or other matter in the mail, shall be fined not more than $300.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 357 (Mar. 4, 1909, ch. 321, § 227, 35 Stat. 1134).

Minor verbal change was made. Section 746(f) of title 8, U.S.C., 1940 ed., Aliens and Nationality, providing same penalty for misuse of franking privilege in naturalization service, should be repealed as covered by this section. The proviso in section 337 of title 39, U.S.C., 1940 ed., The Postal Service, should also be repealed for the same reason.

§ 1720. Canceled stamps and envelopes

Whoever uses or attempts to use in payment of postage, any canceled postage stamp, whether the same has been used or not, or removes, attempts to remove, or assists in removing, the canceling or defacing marks from any postage stamp, or the superscription from any stamped envelope, or postal card, that has once been used in payment of postage, with the intent to use the same for a like purpose, or to sell or offer to sell the same, or knowingly possesses any such postage stamp, stamped envelope, or postal card, with intent to use the same or knowingly sells or offers to sell any such postage stamp, stamped envelope, or postal card, or uses or attempts to use the same in payment of postage; or

Whoever unlawfully and willfully removes from any mail matter any stamp attached thereto in payment of postage; or

Whoever knowingly uses in payment of postage, any postage stamp, postal card, or stamped envelope, issued in pursuance of law, which has already been used for a like purpose—

Shall be fined not more than $500 or imprisoned not more than one year, or both; but if he is a person employed in the Postal Service, he shall be fined not more than $500 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 328 (Mar. 4, 1909, ch. 321, § 205, 35 Stat. 1127).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

§ 1721. Sale or pledge of stamps

Whoever, being a Postal Service officer or employee, knowingly and willfully: uses or disposes of postage stamps, stamped envelopes, or postal cards entrusted to his care or custody in the payment of debts, or in the purchase of merchandise or other salable articles, or pledges or hypothecates the same or sells or disposes of them except for cash; or sells or disposes of postage stamps or postal cards for any larger or less sum than the values indicated on their faces; or sells or disposes of stamped envelopes for a larger or less sum than is charged therefor by the Postal Service for like quantities; or sells or disposes of postage stamps, stamped envelopes, or postal cards at any point or place outside of the delivery of the office where such officer or employee is employed; or for the purpose of increasing the emoluments, or compensation of any such officer or employee, inflates or induces the inflation of the receipts of any post office or any station or branch thereof; or sells or disposes of postage stamps, stamped envelopes, or postal cards, otherwise than as provided by law or the regulations of the Postal Service; shall be fined not more than $500 or imprisoned not more than one year, or both.

(As amended Aug. 1, 1956, c. 818, 70 Stat. 784; Aug. 12, 1970, Pub.L. 91–375, § 6(j)(29), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on section 331 of title 18 and section 364 of title 39, The Postal Service both U.S.C., 1940 ed. (R.S. § 3920; Mar. 4, 1909, ch. 321, § 208, 35 Stat. 1128).

Said sections were consolidated with only minor changes in phraseology.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

§ 1722. False evidence to secure second-class rate

Whoever knowingly submits to the Postal Service or to any officer or employee of the Postal Service, any false evidence relative to any publication for the purpose of securing the admission thereof at the second-class rate, for transportation in the mails, shall be fined not more than $500.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(30), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 353 (Mar. 4, 1909, ch. 321, § 223, 35 Stat. 1133).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal change was made.

§ 1723. Avoidance of postage by using lower class matter

Matter of the second, third, or fourth class containing any writing or printing in addition to the original matter, other than as authorized by law, shall not be admitted to the mails, nor delivered, except upon payment of postage for matter of the first class, deducting therefrom any amount which may have been prepaid by stamps affixed, unless by direction of a duly authorized officer of the Postal Service such postage shall be remitted.

Whoever knowingly conceals or incloses any matter of a higher class in that of a lower class, and deposits the same for conveyance by mail, at a less rate than would be charged for such higher class matter, shall be fined not more than $100.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(31), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 351 (Mar. 4, 1909, ch. 321, § 221, 35 Stat. 1132).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

§ 1724. Postage on mail delivered by foreign vessels

Except as otherwise provided by treaty or convention the Postal Service may require the transportation by any steamship of mail between the United States and any foreign port at the compensation fixed under authority of law. Upon refusal by the master or the commander of such steamship

or vessel to accept the mail, when tendered by the Postal Service or its representative, the collector or other officer of the port empowered to grant clearance, on notice of the refusal aforesaid, shall withhold clearance, until the collector or other officer of the port is informed by the Postal Service or its representative that the master or commander of the steamship or vessel has accepted the mail or that conveyance by his steamship or vessel is no longer required by the Postal Service.

(As amended Sept. 25, 1951, c. 413, § 1(4), 65 Stat. 336; Aug. 12, 1970, Pub.L. 91–375, § 6(j)(32), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 326 (Mar. 4, 1909, ch. 321, § 203, 35 Stat. 1127; Feb. 6, 1929, ch. 157, 45 Stat. 1153).

§ 1725. Postage unpaid on deposited mail matter

Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(33), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 321a (May 7, 1934, ch. 220, § 2, 48 Stat. 667).

Reference to persons aiding or assisting was deleted as unnecessary since such persons are made principals by section 2 of this title.

Minor verbal changes were made.

§ 1726. Postage collected unlawfully

Whoever, being a postmaster or other person authorized to receive the postage of mail matter, fraudulently demands or receives any rate of postage or gratuity or reward other than is provided by law for the postage of such mail matter, shall be fined not more than $100 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 330 (Mar. 4, 1909, ch. 321, § 207, 35 Stat. 1128).

Minor verbal changes were made.

[§ 1727. Repealed. Pub.L. 90–384, § 1(a), July 5, 1968, 82 Stat. 292]

§ 1728. Weight of mail increased fraudulently

Whoever places any matter in the mails during the regular weighing period, for the purpose of increasing the weight of the mail, with intent to cause an increase in the compensation of the railroad mail carrier over whose route such mail may pass, shall be fined not more than $20,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 358 (Mar. 4, 1909, ch. 321, § 228, 35 Stat. 1134).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

§ 1729. Post office conducted without authority

Whoever, without authority from the Postal Service, sets up or professes to keep any office or place of business bearing the sign, name, or title of post office, shall be fined not more than $500.

(As amended Aug. 12, 1970, Pub.L. 91–375, § 6(j)(34), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 302 (Mar. 4, 1909, ch. 321, § 179, 35 Stat. 1123).

Minor verbal changes were made.

§ 1730. Uniforms of carriers

Whoever, not being connected with the letter-carrier branch of the Postal Service, wears the uniform or badge which may be prescribed by the Postal Service to be worn by letter carriers, shall be fined not more than $100 or imprisoned not more than six months, or both.

The provisions of the preceding paragraph shall not apply to an actor or actress in a theatrical, television, or motion-picture production who wears the uniform or badge of the letter-carrier branch of the Postal Service while portraying a member of that service, if the portrayal does not tend to discredit that service.

(As amended July 21, 1968, Pub.L. 90–413, 82 Stat. 396; Aug. 12, 1970, Pub.L. 91–375, § 6(j)(35), 84 Stat. 780.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 310 (Mar. 4, 1909, ch. 321, § 187, 35 Stat. 1124).

Minor verbal change was made.

§ 1731. Vehicles falsely labeled as carriers

It shall be unlawful to paint, print, or in any manner to place upon or attach to any steamboat or other vessel, or any car, stagecoach, vehicle, or other conveyance, not actually used in carrying the mail, the words "United States Mail", or any words, letters, or characters of like import; or to give notice, by publishing in any newspaper or otherwise, that any steamboat or other vessel, or any car, stagecoach, vehicle, or other conveyance, is used in carrying the mail, when the same is not actually so used.

Whoever violates, and every owner, receiver, lessee, or managing operator who suffers, or permits the violation of, any provision of this section, shall be fined not more than $500 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 311 (Mar. 4, 1909, ch. 321, § 188, 35 Stat. 1124).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

The punishment provision was rewritten to conform more closely with comparable offenses in other sections. (See sections 1729 and 1730 of this title.)

Minor verbal changes were made.

§ 1732. Approval of bond or sureties by postmaster

Whoever, being a postmaster, affixes his signature to the approval of any bond of a bidder, or to the certificate of sufficiency of sureties in any contract, before the said bond or contract is signed by the bidder or contractor and his sureties, or knowingly, or without the exercise of due diligence, approves any bond of a bidder with insufficient sureties, or knowingly makes any false or fraudulent certificate, shall be fined not more than $5,000 or imprisoned not more than one year, or both; and shall be dismissed from office and disqualified from holding the office of postmaster.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 352 (Mar. 4, 1909, ch. 321, § 222, 35 Stat. 1133).

Minor verbal changes were made.

§ 1733. Mailing periodical publications without prepayment of postage

Whoever, except as permitted by law, knowingly mails any periodical publication without the prepayment of postage, or, being an officer or employee of the Postal Service, knowingly permits any periodical publication to be mailed without prepayment of postage, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

(Added Pub.L. 86–682, § 7, Sept. 2, 1960, 74 Stat. 705, and amended Pub.L. 91–375, § 6(j)(36)(A), Aug. 12, 1970, 84 Stat. 780.)

§ 1734. Editorials and other matter as "advertisements"

Whoever, being an editor or publisher, prints in a publication entered as second class mail, editorial or other reading matter for which he has been paid or promised a valuable consideration, without plainly marking the same "advertisement" shall be fined not more than $500.

(Added Pub.L. 86–682, § 7, Sept. 2, 1960, 74 Stat. 706.)

§ 1735. Sexually oriented advertisements

(a) Whoever—

(1) willfully uses the mails for the mailing, carriage in the mails, or delivery of any sexually oriented advertisement in violation of section 3010 of title 39, or willfully violates any regulations of the Board of Governors issued under such section; or

(2) sells, leases, rents, lends, exchanges, or licenses the use of, or, except for the purpose expressly authorized by section 3010 of title 39, uses a mailing list maintained by the Board of Governors under such section;

shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for any second or subsequent offense.

(b) For the purposes of this section, the term "sexually oriented advertisement" shall have the same meaning as given it in section 3010(d) of title 39.

(Added Pub.L. 91–375, § 6(j)(37)(A), Aug. 12, 1970, 84 Stat. 781.)

§ 1736. Restrictive use of information

(a) No information or evidence obtained by reason of compliance by a natural person with any provision of section 3010 of title 39, or regulations issued thereunder, shall, except as provided in subsection (c) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding.

(b) The fact of the performance of any act by an individual in compliance with any provision of section 3010 of title 39, or regulations issued thereunder, shall not be deemed the admission of any fact, or otherwise be used, directly or indirectly, as evidence against that person in a criminal proceed-

ing, except as provided in subsection (c) of this section.

(c) Subsections (a) and (b) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

(Added Pub.L. 91–375, § 6(j)(37)(A), Aug. 12, 1970, 84 Stat. 781.)

§ 1737. Manufacturer of sexually related mail matter

(a) Whoever shall print, reproduce, or manufacture any sexually related mail matter, intending or knowing that such matter will be deposited for mailing or delivery by mail in violation of section 3008 or 3010 of title 39, or in violation of any regulation of the Postal Service issued under such section, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for any second or subsequent offense.

(b) As used in this section, the term "sexually related mail matter" means any matter which is within the scope of section 3008(a) or 3010(d) of title 39.

(Added Pub.L. 91–375, § 6(j)(37)(A), Aug. 12, 1970, 84 Stat. 781.)

§ 1738. Mailing private identification documents without a disclaimer

(a) Whoever, being in the business of furnishing identification documents for valuable consideration, and in the furtherance of that business, uses the mails for the mailing, carriage in the mails, or delivery of, or causes to be transported in interstate or foreign commerce, any identification document—

(1) which bears a birth date or age purported to be that of the person named in such identification document; and

(2) knowing that such document fails to carry diagonally printed clearly and indelibly on both the front and back "NOT A GOVERNMENT DOCUMENT" in capital letters in not less than twelve point type;

shall be fined not more than $1,000, imprisoned not more than one year, or both.

(b) For purposes of this section the term "identification document" means a document which is of a type intended or commonly accepted for the purpose of identification of individuals and which is not issued by or under the authority of a government.

(Added Pub.L. 97–398, § 4(a), Dec. 31, 1982, 96 Stat. 2011.)

CHAPTER 84—PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION, KIDNAPING, AND ASSAULT

Sec.

1751. Presidential and Presidential staff assassination, kidnaping, and assault; penalties.

1752.[1] Temporary residences and offices of the President and others.

[1] Section added and amended without amending chapter analysis to reflect such enactment or amendment.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1751. Presidential and Presidential staff assassination, kidnaping, and assault; penalties

(a) Whoever kills (1) any individual who is the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the Office of the President of the United States, the Vice President-elect, or any person who is acting as President under the Constitution and laws of the United States, or (2) any person appointed under section 105(a)(2)(A) of title 3 employed in the Executive Office of the President or appointed under section 106(a)(1)(A) of title 3 employed in the Office of the Vice President, shall be punished as provided by sections 1111 and 1112 of this title.

(b) Whoever kidnaps any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.

(d) If two or more persons conspire to kill or kidnap any individual designated in subsection (a) of this section and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

(e) Whoever assaults any person designated in subsection (a)(1) shall be fined not more than $10,000, or imprisoned not more than ten years, or

both. Whoever assaults any person designated in subsection (a)(2) shall be fined not more than $5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

(f) The terms "President-elect" and "Vice-President-elect" as used in this section shall mean such persons as are the apparent successful candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2.

(g) The Attorney General of the United States, in his discretion, is authorized to pay an amount not to exceed $100,000 for information and services concerning a violation of subsection (a)(1). Any officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this subsection.

(h) If Federal investigative or prosecutive jurisdiction is asserted for a violation of this section, such assertion shall suspend the exercise of jurisdiction by a State or local authority, under any applicable State or local law, until Federal action is terminated.

(i) Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

(j) In a prosecution for an offense under this section the Government need not prove that the defendant knew that the victim of the offense was an official protected by this section.

(k) There is extraterritorial jurisdiction over the conduct prohibited by this section.

(Added Pub.L. 89–141, § 1, Aug. 28, 1965, 79 Stat. 580, and amended Pub.L. 97–285, §§ 3, 4(a), Oct. 6, 1982, 96 Stat. 1220.)

§ 1752. Temporary residences and offices of the President and others

(a) It shall be unlawful for any person or group of persons—

(1) willfully and knowingly to enter or remain in

(i) any building or grounds designated by the Secretary of the Treasury as temporary residences of the President or other person protected by the Secret Service or as temporary offices of the President and his staff or of any other person protected by the Secret Service, or

(ii) any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting, in violation of the regulations governing ingress or egress thereto;

(2) with intent to impede or disrupt the orderly conduct of Government business or official functions, to engage in disorderly or disruptive conduct in, or within such proximity to, any building or grounds designated in paragraph (1) when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions;

(3) willfully and knowingly to obstruct or impede ingress or egress to or from any building, grounds, or area designated or enumerated in paragraph (1); or

(4) willfully and knowingly to engage in any act of physical violence against any person or property in any building, grounds, or area designated or enumerated in paragraph (1).

(b) Violation of this section, and attempts or conspiracies to commit such violations, shall be punishable by a fine not exceeding $500 or imprisonment not exceeding six months, or both.

(c) Violation of this section, and attempts or conspiracies to commit such violations, shall be prosecuted by the United States attorney in the Federal district court having jurisdiction of the place where the offense occurred.

(d) The Secretary of the Treasury is authorized—

(1) to designate by regulations the buildings and grounds which constitute the temporary residences of the President or other person protected by the Secret Service and the temporary offices of the President and his staff or of any other person protected by the Secret Service, and

(2) to prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President or other person protected by the Secret Service is or will be temporarily visiting.

(e) None of the laws of the United States or of the several States and the District of Columbia shall be superseded by this section.

(f) As used in this section, the term "other person protected by the Secret Service" means any person whom the United States Secret Service is authorized to protect under section 3056 of this

title when such person has not declined such protection.

(Added Pub.L. 91–644, Title V, § 18, Jan. 2, 1971, 84 Stat. 1891, and amended Pub.L. 97–308, § 1, Oct. 14, 1982, 96 Stat. 1451; Pub.L. 98–587, § 3(b), Oct. 30, 1984, 98 Stat. 3112.)

CHAPTER 85—PRISON-MADE GOODS

Sec.
1761. Transportation or importation.
1762. Marking packages.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1761. Transportation or importation

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) This chapter shall not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State.

(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall also not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners participating in a program of not more than twenty pilot projects designated by the Director of the Bureau of Justice Assistance and who—

(1) have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows:

(A) taxes (Federal, State, local);

(B) reasonable charges for room and board as determined by regulations which shall be issued by the Chief State correctional officer;

(C) allocations for support of family pursuant to State statute, court order, or agreement by the offender;

(D) contributions to any fund established by law to compensate the victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages;

(2) have not solely by their status as offenders, been deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment, such as workmen's compensation. However, such convicts or prisoners shall not be qualified to receive any payments for unemployment compensation while incarcerated, notwithstanding any other provision of the law to the contrary;

(3) have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment.

(d) Notwithstanding any law to the contrary, materials produced by convict labor may be used in the construction of any highways or portion of highways located on Federal-aid systems, as described in section 103 of title 23, United States Code.

(As amended Pub.L. 90–351, Title I, § 819(a), formerly § 827(a), as added Dec. 27, 1979, Pub.L. 96–157, § 2, 93 Stat. 1215, renumbered and amended Oct. 12, 1984, Pub.L. 98–473, Title II, §§ 609B(f), 609K, 98 Stat. 2093, 2102.)

Amendment of Subsec. (a)

Section 223(c) of Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 2028, amended subsec. (a) by inserting ", supervised release," after "parole" effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 396a, 396b (July 24, 1935, ch. 412, § 1, 49 Stat. 494; Oct. 14, 1940, ch. 872, 54 Stat. 1134; July 9, 1941, ch. 283, 55 Stat. 581).

Section consolidates sections 396a and 396b of title 18, U.S.C., 1940 ed. Each section related to the same subject matter and defined the same offense. Section 396a of title 18, U.S.C., 1940 ed., was enacted later and superseded section 396b of title 18, U.S.C., 1940 ed.

Reference to persons aiding, causing or assisting was omitted. Such persons are principals under section 2 of this title.

Reference to states, territories, specific places, etc., were omitted. This was made possible by insertion of words "interstate commerce or from any foreign country into the United States," and by definitive section 10 of this title.

Subsection (b) was rewritten to eliminate ambiguity and uncertainty by expressly making the exceptive language apply to the entire chapter and by permitting State institutions to manufacture goods for the Federal Government and the District of Columbia and vice versa. In

such subsections, the words "penal and correctional" and "penal or correctional," preceding "institutions" and "institution," respectively, were omitted as surplusage.

Minor changes in phraseology were made.

Effective Date of Renumbering. Section 609AA of Pub.L. 98–473, Title II, c. VI, Oct. 12, 1984, 98 Stat. 2107, provided that the renumbering of section 827 of Pub.L. 90–351, Title I, as section 819 shall take effect on Oct. 12, 1984.

Exemptions to Federal Restrictions on Marketability of Prison Made Goods. Pub.L. 90–351, Title I, § 819(c), formerly § 827(c), as added Pub.L. 96–157, § 2, Dec. 27, 1979, 93 Stat. 1215, and renumbered and amended Pub.L. 98–473, Title II, c. VI, § 609B(f), (*o*), Oct. 12, 1984, 98 Stat. 2093, 2096, provided that:

"The provisions of section 1761 of title 18, United States Code, and of the first section of the Act of June 30, 1936 (49 Stat. 2036; 41 U.S.C. 35), commonly known as the Walsh-Healey Act, creating exemptions to Federal restrictions on marketability of prison made goods, as amended from time to time, shall not apply unless—

"(1) representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project qualifying of any exemption created by this section; and

"(2) such paid inmate employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services."

§ 1762. Marking packages

(a) All packages containing any goods, wares, or merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

(b) Whoever violates this section shall be fined not more than $1,000, and any goods, wares, or merchandise transported in violation of this section or section 1761 of this title shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 396c, 396d, 396e (July 24, 1935, ch. 412, §§ 2, 3, 4, 49 Stat. 494, 495).

Section consolidates sections 396c, 396d, and 396e of title 18, U.S.C., 1940 ed.

Words "upon conviction thereof" were deleted as unnecessary, since punishment cannot be imposed until after conviction.

Words "transported in violation of this section or section 1761" were added after the word "merchandise" to continue existing law.

The provisions of said section 396e of title 18, U.S.C., 1940 ed., relating to venue, were omitted as covered by section 3237 of this title.

Minor changes were made in translations and phraseology.

CHAPTER 87

Sec.
1791. Providing or possessing contraband in prison.
1792. Mutiny and riot prohibited.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1791. Providing or possessing contraband in prison

(a) Offense.—A person commits an offense if, in violation of a statute, or a regulation, rule, or order issued pursuant thereto—

(1) he provides, or attempts to provide, to an inmate of a Federal penal or correctional facility—

(A) a firearm or destructive device;

(B) any other weapon or object that may be used as a weapon or as a means of facilitating escape;

(C) a narcotic drug as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802);

(D) a controlled substance, other than a narcotic drug, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or an alcoholic beverage;

(E) United States currency; or

(F) any other object; or

(2) being an inmate of a Federal penal or correctional facility, he makes, possesses, procures, or otherwise provides himself with, or attempts to make, possess, procure, or otherwise provide himself with, anything described in paragraph (1).

(b) Grading.—An offense described in this section is punishable by—

(1) imprisonment for not more than ten years, a fine of not more than $25,000, or both, if the object is anything set forth in paragraph (1)(A);

(2) imprisonment for not more than five years, a fine of not more than $10,000, or both, if the

object is anything set forth in paragraph (1)(B) or (1)(C);

(3) imprisonment for not more than one year, a fine of not more than $5,000, or both, if the object is anything set forth in paragraph (1)(D) or (1)(E); and

(4) imprisonment for not more than six months, a fine of not more than $1,000, or both, if the object is any other object.

(c) Definitions.—As used in this section, "firearm" and "destructive device" have the meaning given those terms, respectively, in 18 U.S.C. 921(a)(3) and (4).

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 1109(a), 98 Stat. 2147.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 753j, 908 (May 14, 1930, ch. 274, § 11, 46 Stat. 327; May 27, 1930, ch. 339, § 8, 46 Stat. 390).

Section consolidates sections 753j and 908 of title 18, U.S.C., 1940 ed. The section was broadened to include the taking or sending out of contraband from the institution. This was suggested by representatives of the Federal Bureau of Prisons and the Criminal Division of the Department of Justice. In other respects the section was rewritten without change of substance.

The words "narcotic", "drug", "weapon" and "contraband" were omitted, since the insertion of the words "contrary to any rule or regulation promulgated by the attorney general" preserves the intent of the original statutes.

Words "guilty of a felony" were deleted as unnecessary in view of definitive section I of this title. (See also reviser's note under section 550 of this title.)

Minor verbal changes also were made.

§ 1792. Mutiny and riot prohibited

Whoever instigates, connives, willfully attempts to cause, assists, or conspires to cause any mutiny or riot, at any Federal penal or correctional facility, shall be imprisoned not more than ten years or fined not more than $25,000, or both.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 1109(b), 98 Stat. 2148.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 252 (May 18, 1934, ch. 303, § 1, 48 Stat. 782).

Escape provisions of this section were incorporated in section 752 of this title.

Reference to persons causing, procuring, aiding and assisting was omitted. Such persons are principals under section 2 of this title.

Minor changes were made in translation and phraseology.

CHAPTER 89—PROFESSIONS AND OCCUPATIONS

Sec.
1821. Transportation of dentures.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1821. Transportation of dentures

Whoever transports by mail or otherwise to or within the District of Columbia, the Canal Zone or any Possession of the United States or uses the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory any set of artificial teeth or prosthetic dental appliance or other denture, constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed to practice dentistry under the laws of the place into which such denture is sent or brought, where such laws prohibit:

(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under such laws to practice dentistry;

(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under such laws to practice dentistry; or

(3) the construction or supply of dentures from impressions or casts made by a person not licensed under such laws to practice dentistry—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 420f, 420g, and 420h (Dec. 24, 1942, ch. 823, §§ 1, 2, 3, 56 Stat. 1087).

This section consolidates the offense, penalty, and definitive provisions of sections 420f, 420g, and 420h of title 18, U.S.C., 1940 ed., as subsections (a) and (b).

The definition of "denture" was omitted as unnecessary in view of the phraseology of the revised section, the context of which makes clear the meaning of dentures referred to.

The definition of "Territory" was omitted as unnecessary. The revised section makes clear the places included in the application of the section without the use of definitions.

The definition of "Interstate Commerce" was likewise omitted as unnecessary in view of definition of interstate commerce in section 10 of this title.

Changes of phraseology and arrangement were made, but without change of substance.

CHAPTER 91—PUBLIC LANDS

Sec.
1851. Coal depredations.
1852. Timber removed or transported.
1853. Trees cut or injured.
1854. Trees boxed for pitch or turpentine.
1855. Timber set afire.
1856. Fires left unattended and unextinguished.
1857. Fences destroyed; livestock entering.
1858. Survey marks destroyed or removed.
1859. Surveys interrupted.
1860. Bids at land sales.
1861. Deception of prospective purchasers.
[1862. Repealed.]
1863. Trespass on national forest lands.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1851. Coal depredations

Whoever mines or removes coal of any character, whether anthracite, bituminous, or lignite, from beds or deposits in lands of, or reserved to the United States, with intent wrongfully to appropriate, sell, or dispose of the same, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not interfere with any right or privilege conferred by existing laws of the United States.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 103a, 103b (July 3, 1926, ch. 730, §§ 1, 2, 44 Stat. 891).

Section consolidates sections 103a and 103b of title 18, U.S.C., 1940 ed.

Words "deemed guilty of misdemeanor" were deleted as unnecessary in view of definitive section 1 of this title. (See also reviser's note under section 212 of this title).

Minor changes were made in phraseology.

§ 1852. Timber removed or transported

Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or

Whoever removes any timber from said public lands, with intent to export or to dispose of the same; or

Whoever, being the owner, master, pilot, operator, or consignee of any vessel, motor vehicle, or aircraft or the owner, director, or agent of any railroad, knowingly transports any timber so cut or removed from said lands, or lumber manufactured therefrom—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; nor shall it interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 103 (Mar. 4, 1909, ch. 321, § 49, 35 Stat. 1098).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "motor vehicle or aircraft" were inserted in third paragraph to remove any doubt as to scope of section in view of rapidly advancing methods of transportation.

Minor changes were made in phraseology.

§ 1853. Trees cut or injured

Whoever unlawfully cuts, or wantonly injures or destroys any tree growing, standing, or being upon any land of the United States which, in pursuance of law, has been reserved or purchased by the United States for any public use, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 104 (Mar. 4, 1909, ch. 321, § 50, 35 Stat. 1098; June 25, 1910, ch. 431, § 6, 36 Stat. 857).

Reference to persons aiding or procuring was deleted as unnecessary since such persons are made principals by section 2 of this title.

Maximum fine was increased from $500 to $1,000 to conform to other comparable sections of this chapter. (See sections 1851 and 1852 of this title.)

Minor changes were also made in phraseology.

§ 1854. Trees boxed for pitch or turpentine

Whoever cuts, chips, chops, or boxes any tree upon any lands belonging to the United States, or upon any lands covered by or embraced in any unperfected settlement, application, filing, entry, selection, or location, made under any law of the

United States, for the purpose of obtaining from such tree any pitch, turpentine, or other substance; or

Whoever buys, trades for, or in any manner acquires any pitch, turpentine, or other substance, or any article or commodity made from any such pitch, turpentine, or other substance, with knowledge that the same has been so unlawfully obtained—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 105 (Mar 4, 1909, ch. 321, § 51, 35 Stat. 1098).

Reference to persons aiding, encouraging, or causing was deleted as unnecessary since such persons are made principals by section 2 of this title.

Maximum fine was increased from $500 to $1,000 to conform to other comparable sections of this chapter. (See sections 1851 and 1852 of this title.)

Minor changes also were made in phraseology.

§ 1855. Timber set afire

Whoever, willfully and without authority, sets on fire any timber, underbrush, or grass or other inflammable material upon the public domain or upon any lands owned or leased by or under the partial, concurrent, or exclusive jurisdiction of the United States, or under contract for purchase or for the acquisition of which condemnation proceedings have been instituted, or upon any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

This section shall not apply in the case of a fire set by an allottee in the reasonable exercise of his proprietary rights in the allotment.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 106 (Mar. 4, 1909, ch. 321, § 52, 35 Stat. 1098; Nov. 15, 1941, ch. 472, § 1, 55 Stat. 763).

Surplus verbiage and unnecessary enumerations were omitted.

Words "without authority" were inserted near beginning of section so as to remove any doubt as to scope or meaning of section.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor verbal changes were made.

§ 1856. Fires left unattended and unextinguished

Whoever, having kindled or caused to be kindled, a fire in or near any forest, timber, or other inflammable material upon any lands owned, controlled or leased by, or under the partial, concurrent, or exclusive jurisdiction of the United States, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted, and including any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under the authority of the United States, or any Indian allotment while the title to the same is held in trust by the United States, or while the same shall remain inalienable by the allottee without the consent of the United States, leaves said fire without totally extinguishing the same, or permits or suffers said fire to burn or spread beyond his control, or leaves or suffers said fire to burn unattended, shall be fined not more than $500 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 107 (Mar 4, 1909, ch. 321, § 53, 35 Stat. 1908; June 25, 1910, ch. 431, § 6, 36 Stat. 857; Nov. 15, 1941, ch. 472, § 2, 55 Stat. 764).

Words "without hard labor" which followed "six months" and preceded "or both" were omitted as unnecessary. (See reviser's note under section 1 of this title.)

Enumeration of applicable condemnation statutes was deleted and section extended and made applicable to all lands in process of condemnation by the government. This does no violence to the intent to Congress and clarifies the section considerably.

Other changes in phraseology were made.

§ 1857. Fences destroyed; livestock entering

Whoever knowingly and unlawfully breaks, opens, or destroys any gate, fence, hedge, or wall inclosing any lands of the United States reserved or purchased for any public use; or

Whoever drives any cattle, horses, hogs, or other livestock upon any such lands for the purposes of destroying the grass or trees on said lands, or where they may destroy the said grass or trees; or

Whoever knowingly permits his cattle, horses, hogs, or other livestock to enter through any such inclosure upon any such lands of the United States, where such cattle, horses, hogs, or other livestock may or can destroy the grass or trees or other property of the United States on the said lands—

Shall be fined not more than $500 or imprisoned not more than one year, or both.

This section shall not apply to unreserved public lands.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 111 (Mar. 4, 1909, ch. 321, § 56, 35 Stat. 1099).

Minor changes were made in phraseology.

§ 1858. Survey marks destroyed or removed

Whoever willfully destroys, defaces, changes, or removes to another place any section corner, quarter-section corner, or meander post, on any Government line of survey, or willfully cuts down any witness tree or any tree blazed to mark the line of a Government survey, or willfully defaces, changes, or removes any monument or bench mark of any Government survey, shall be fined not more than $250 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 111 (Mar 4, 1909, ch. 321, § 57, 35 Stat. 1099).

Minor changes were made in phraseology.

§ 1859. Surveys interrupted

Whoever, by threats or force, interrupts, hinders, or prevents the surveying of the public lands, or of any private land claim which has been or may be confirmed by the United States, by the persons authorized to survey the same in conformity with the instructions of the Director of the Bureau of Land Management, shall be fined not more than $3,000 or imprisoned not more than three years, or both.

(As amended May 24, 1949, c. 139, § 42, 63 Stat. 95.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 112 (Mar. 4, 1909, ch. 321, § 58, 35 Stat. 1099).

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

1949 ACT

This section [section 42] substitutes, in section 1859 of title 18, U.S.C., "Director of the Bureau of Land Management" for "Commissioner of the General Land Office," in view of the abolishment of the General Land Office, and the office of Commissioner thereof, by 1946 Reorganization Plan No. 3, § 403, effective July 16, 1946 (11 F.R. 7876). Such plan consolidated the functions of the General Land Office and of the Grazing Service to form a new agency, the Bureau of Land Management, in the Department of the Interior and headed by a Director.

§ 1860. Bids at land sales

Whoever bargains, contracts, or agrees, or attempts to bargain, contract, or agree with another that such other shall not bid upon or purchase any parcel of lands of the United States offered at public sale; or

Whoever, by intimidation, combination, or unfair management, hinders, prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 113 (Mar. 4, 1909, ch. 321, § 59, 35 Stat. 1099).

Imprisonment provision was reduced from "two years" to "one year," thus placing the offense in the category of misdemeanors which may be prosecuted on information. The lesser punishment seems adequate.

Minor changes were made in phraseology and arrangement.

§ 1861. Deception of prospective purchasers

Whoever, for a reward paid or promised to him in that behalf, undertakes to locate for an intending purchaser, settler, or entryman any public lands of the United States subject to disposition under the public-land laws, and who willfully and falsely represents to such intending purchaser, settler, or entryman that any tract of land shown to him is public land of the United States subject to sale, settlement, or entry, or that it is of a particular surveyed description, with intent to deceive the person to whom such representation is made, or who, in reckless disregard of the truth, falsely represents to any such person that any tract of land shown to him is public land of the United States subject to sale, settlement, or entry, or that it is of a particular surveyed description, thereby deceiving the person to whom such representation is made, shall be fined not more than $300 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 114 (Feb. 23, 1917, ch. 115, 39 Stat. 936).

Words "deemed guilty of a misdemeanor and" which preceded "punished" were omitted as unnecessary in view of definitive section 1 of this title.

Minor changes were made in phraseology.

[§ 1862. Repealed. Pub.L. 95–200, § 3(c), Nov. 23, 1977, 91 Stat. 1428]

§ 1863. Trespass on national forest lands

Whoever, without lawful authority or permission, goes upon any national-forest land while it is closed to the public pursuant to lawful regulation of the Secretary of Agriculture, shall be fined not more

than $500 or imprisoned not more than six months, or both.

(Added May 24, 1949, c. 139, § 43, 63 Stat. 95.)

HISTORICAL AND REVISION NOTES

This section [section 43] incorporates in revised title 18, U.S.C., as section 1863 thereof, and with changes in phraseology, the provisions of act of February 10, 1948 (ch. 51, 62 Stat. 19), which was not incorporated in title 18 when the revision was enacted. The phrase "without hard labor" is omitted from the punishment clause as unnecessary, in conformity with the uniform style of such title. (See reviser's note to sec. 1 of such revised title, appearing in H. Rept. No. 304, April 24, 1947, to accompany H.R. 3190, 80th Cong. (pp. A2, A4 of such report).) The concluding proviso that "nothing herein shall be construed to limit the authority of the Secretary of Agriculture under other law to otherwise provide for regulating the occupancy and use of national-forest lands and lands administered by the Forest Service", is omitted as surplusage.

CHAPTER 93—PUBLIC OFFICERS AND EMPLOYEES

Sec.
1901. Collecting or disbursing officer trading in public property.
1902. Disclosure of crop information and speculation thereon.
1903. Speculation in stocks or commodities affecting crop insurance.
1904. Disclosure of information or speculation in securities affecting Reconstruction Finance Corporation.
1905. Disclosure of confidential information generally.
1906. Disclosure of information by bank examiner.[1]
1907. Disclosure of information by farm credit examiner.
1908. Disclosure of information by National Agricultural Credit Corporation examiner.
1909. Examiner performing other services.
1910. Nepotism in appointment of receiver or trustee.
1911. Receiver mismanaging property.
1912. Unauthorized fees for inspection of vessels.
1913. Lobbying with appropriated moneys.
1914. Salary of Government officials and employees payable only by United States.[2]
1915. Compromise of customs liabilities.
1916. Unauthorized employment and disposition of lapsed appropriations.
1917. Interference with civil service examinations.
1918. Disloyalty and asserting the right to strike against the Government.
1919. False statement to obtain unemployment compensation for Federal service.
1920. False statement to obtain Federal employees' compensation.
1921. Receiving Federal employees' compensation after marriage.
1922. False or withheld report concerning Federal employees' compensation.
1923. Fraudulent receipt of payments of missing persons.

1 Section catchline amended by Pub.L. 95–320, § 3, July 21, 1978, 92 Stat. 393, without amending analysis to reflect the change.

2 Section repealed without amending analysis to reflect such repeal.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1901. Collecting or disbursing officer trading in public property

Whoever, being an officer of the United States concerned in the collection or the disbursement of the revenues thereof, carries on any trade or business in the funds or debts of the United States, or of any State, or in any public property of either, shall be fined not more than $3,000 or imprisoned not more than one year, or both; and shall be removed from office, and be incapable of holding any office under the United States.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 192 (Mar. 4, 1909, ch. 321, § 103, 35 Stat. 1107)

Minor changes were made in phraseology.

§ 1902. Disclosure of crop information and speculation thereon

Whoever, being an officer, employee or person acting for or on behalf of the United States or any department or agency thereof, and having by virtue of his office, employment or position, become possessed of information which might influence or affect the market value of any product of the soil grown within the United States, which information is by law or by the rules of such department or agency required to be withheld from publication until a fixed time, willfully imparts, directly or indirectly, such information, or any part thereof, to any person not entitled under the law or the rules of the department or agency to receive the same; or, before such information is made public through regular official channels, directly or indirectly speculates in any such product by buying or selling the same in any quantity, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

No person shall be deemed guilty of a violation of any such rules, unless prior to such alleged violation he shall have had actual knowledge thereof.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 214 (Mar. 4, 1909, ch. 321, § 123, 35 Stat. 1110).

Words "agency thereof" were inserted in lieu of "office thereof" at beginning of section conformity with section 6 of this title.

Minor changes were made in phraseology.

§ 1903. Speculation in stocks or commodities affecting crop insurance

Whoever, while acting in any official capacity in the administration of any Act of Congress relating to crop insurance or to the Federal Crop Insurance Corporation speculates in any agricultural commodity or product thereof, to which such enactments apply, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Historical and Revision Notes

Based on section 1514(b) of title 7, U.S.C., 1940 ed., Agriculture (Feb. 16, 1938, ch. 30, title V, § 514(b), 52 Stat. 76).

Words "upon conviction thereof" were omitted as surplusage since punishment can be imposed only after a conviction.

Minor changes were made in phraseology and translations.

§ 1904. Disclosure of information or speculation in securities affecting Reconstruction Finance Corporation

Whoever, being connected in any capacity with the Reconstruction Finance Corporation, gives any unauthorized information concerning any future action or plan of the said Corporation which might affect the value of securities, or, having such knowledge, invests or speculates, directly or indirectly in the securities or property of any company, bank, or corporation receiving loans or other assistance from the said Corporation, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on section 616(c) of title 15, U.S.C., 1940 ed., Commerce and Trade (Jan. 22, 1932, ch. 8, § 16(c), 47 Stat. 11, 12).

Minor changes were made in translations and phraseology.

Abolition of Reconstruction Finance Corporation. The Reconstruction Finance Corporation was abolished.

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311–1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

(As amended Sept. 12, 1980, Pub.L. 96–349, § 7(b), 94 Stat. 1158.)

Historical and Revision Notes

Based on section 176b of title 15, U.S.C., 1940 ed., Commerce and Trade; section 216 of title 18, U.S.C., 1940 ed.; section 1335 of title 19, U.S.C., 1940 ed., Customs Duties (R.S. § 3167; Aug. 27, 1894, ch. 349, § 24, 28 Stat. 557; Feb. 26, 1926, ch. 27, § 1115, 44 Stat. 117; June 17, 1930, ch. 497, title III, § 335, 46 Stat. 701; Jan. 27, 1938, ch. 11, § 2, 52 Stat. 8).

Section consolidates section 176b of title 15, U.S.C., 1940 ed., Commerce and Trade; section 216 of title 18, U.S.C., 1940 ed., and section 1335 of title 19, U.S.C., 1940 ed., Customs Duties.

Words "or of any department or agency thereof" and words "such department or agency" were inserted so as to eliminate any possible ambiguity as to scope of section. (See definition of "department" and "agency" in section 6 of this title.)

References to the offenses as misdemeanors, contained in all of said sections, were omitted in view of definitive section 1 of this title.

The provisions of section 216 of title 18, U.S.C., 1940 ed., relating to publication of income tax data by "any person", were omitted as covered by section 55(f)(1) of title 26, U.S.C., 1940 ed., Internal Revenue Code.

Minor changes were made in translations and phraseology.

References in Text. The Antitrust Civil Process Act, referred to in text, is classified generally to section 1311 et seq. of Title 15, U.S.C.A., Commerce and Trade.

§ 1906. Disclosure of information from a bank examination report

Whoever, being an examiner, public or private, or a General Accounting Office employee with access to bank examination report information under sec-

tion 714 of title 31, discloses the names of borrowers or the collateral for loans of any member bank of the Federal Reserve System, or bank insured by the Federal Deposit Insurance Corporation examined by him or subject to General Accounting Office audit under section 714 of title 31 to other than the proper officers of such bank, without first having obtained the express permission in writing from the Comptroller of the Currency as to a national bank, the Board of Governors of the Federal Reserve System as to a State member bank, or the Federal Deposit Insurance Corporation as to any other insured bank, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or either House thereof, or any committee of Congress or either House duly authorized or as authorized by section 714 of title 31 shall be fined not more than $5,000 or imprisoned not more than one year or both.

(As amended July 21, 1978, Pub.L. 95-320, § 3, 92 Stat. 393; Sept. 13, 1982, Pub.L. 97-258, § 3(e)(1), 96 Stat. 1064.)

HISTORICAL AND REVISION NOTES

Based on section 594 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22 [second and third sentences of second paragraph], 38 Stat. 272, 273; Sept. 26, 1918, ch. 177, § 5 [22(b), second paragraph], 40 Stat. 970; Aug. 23, 1935, ch. 614, § 326(b), 49 Stat. 716).

Other provisions of section 594 of title 12, U.S.C., 1940 ed., Banks and Banking, were consolidated with similar provisions from other sections, to form section 1909 of this title.

Changes were made in phraseology.

§ 1907. Disclosure of information by farm credit examiner

Whoever, being a farm credit examiner or any examiner, public or private, discloses the names of borrowers of any Federal land bank association or Federal land bank, or any organization examined by him under the provisions of law relating to Federal intermediate credit banks, to other than the proper officers of such institution or organization, without first having obtained express permission in writing from the Land Bank Commissioner or from the board of directors of such institution or organization, except when ordered to do so by a court of competent jurisdiction or by direction of the Congress of the United States or either House thereof, or any committee of Congress or either House duly authorized, shall be fined not more than $5,000 or imprisoned not more than one year, or both; and shall be disqualified from holding office as a farm credit examiner.

(As amended Aug. 18, 1959, Pub.L. 86-168, Title I, § 104(h), 73 Stat. 387; Oct. 12, 1982, Pub.L. 97-297, § 4(c), 96 Stat. 1318.)

HISTORICAL AND REVISION NOTES

Based on sections 983 and 1124 of title 12, U.S.C., 1940 ed., Banks and Banking (July 17, 1916, ch. 245, § 31 [third and fourth sentences of third paragraph], 39 Stat. 383; July 17, 1916, ch. 245, § 211(d) [part of first sentence], as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1460; June 16, 1933, ch. 98, § 80(a), 48 Stat. 273).

Section 983 of title 12, U.S.C., 1940 ed., Banks and Banking, does not include the term "farm credit examiner," as used in this section, but it relates thereto as is indicated by sections 951 and 952 of said title.

Section 1124 of title 12, U.S.C., 1940 ed., Banks and Banking, which was taken from a chapter in that title dealing with Federal intermediate credit banks, also relates to farm credit examiners as is indicated by section 1093 thereof. Even so, it was deemed advisable to retain the reference to any examiner "public or private," as used in said section 1124.

For clarification, the types of associations, banks, and organizations to which section relates, were enumerated wherever referred to, and words "examined by him under the provisions of law relating to Federal intermediate credit banks" were inserted.

In addition, changes were made in phraseology

The provisions relating to disqualification from holding office as an incident to violation were contained in section 1124 of title 12, U.S.C., 1940 ed., Banks and Banking.

For bribery and other provisions of section 1124 of title 12, U.S.C., 1940 ed., Banks and Banking, see sections 218 and 1909 of this title.

Other provisions of said section 983 of title 12, U.S.C., 1940 ed., were incorporated in section 221 of this title.

§ 1908. Disclosure of information by National Agricultural Credit Corporation examiner

Whoever, being an examiner appointed under the provisions of law relating to National Agricultural Credit Corporations, discloses the names of borrowers of any organization examined by him, to other than the proper officers of such organization, without first having obtained express permission in writing from the Comptroller of the Currency or from the board of directors of such organization, except when ordered to do so by a court of competent jurisdiction or by direction of the Congress of the United States or either House thereof, or any committee of Congress or either House duly authorized, shall be fined not more than $5,000 or imprisoned not more than one year, or both; and shall be disqualified from holding office as such examiner.

HISTORICAL AND REVISION NOTES

Based on section 1314 of title 12, U.S.C., 1940 ed., Banks and Banking (Mar. 4, 1923, ch. 252, title II, § 216(d), 42 Stat. 1472).

Minor changes of phraseology were made.

Other provisions of section 1314 of title 12, U.S.C., 1940 ed., Banks and Banking, are incorporated in sections 218 and 1909 of this title.

§ 1909. Examiner performing other services

Whoever, being a national-bank examiner, Federal Deposit Insurance Corporation examiner, farm credit examiner, or an examiner of National Agricultural Credit Corporations, performs any other service, for compensation, for any bank or banking or loan association, or for any officer, director, or employee thereof, or for any person connected therewith in any capacity, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on sections 594, 656a, 952, 981, 1093, 1124, 1243, and 1314 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22, fourth sentence of first paragraph, and third sentence of second paragraph, 38 Stat. 272; July 17, 1916, ch. 245, §§ 28, 31 [third sentence of first paragraph], 39 Stat. 381, 383; July 17, 1916, ch. 245, §§ 208(c), 211(d), second sentence, as added Mar. 4, 1923, ch. 252, § 2, 42 Stat. 1459, 1460; Sept. 26, 1918, ch. 177, § 5 ["22(b)"] 40 Stat. 970; Mar. 4, 1923, ch. 252, title II, §§ 209(c), 216(d) [second sentence], 42 Stat. 1468, 1472; Ex. Ord. No. 6084, Mar. 27, 1933; June 16, 1933, ch. 98, § 80(a), 48 Stat. 273; Aug. 23, 1935, ch. 614, § 326(b), 49 Stat. 716; Aug. 19, 1937, ch. 704, § 20, 50 Stat. 710).

Section 594 of title 12, US.C., 1940 ed., Banks and Banking, first paragraph, related to national-bank examiners and Federal Deposit Insurance Corporation examiners, and provided punishment for several offenses including the offense of performing services, for compensation, other than their regular duties. Section 656a of said title 12 is authority for the designation "farm credit examiner" included in this section, and section 1093 of said title authorizes farm credit examiners to conduct examinations in connection with contemplated transactions of Federal intermediate credit banks, to which section 1124 ot said title relates.

Sections 981 and 1124 of title 12, U.S.C., 1940 ed., Banks and Banking, which relate to farm credit examiners, and section 1314 of said title, which relates to National Agricultural Credit Corporation examiners, all prohibit the performance of services, for compensation, other than regular duties. They do not specifically provide punishment for violation of such prohibition, but the provisions of said section 594 of said title, relating to national-bank examiners and Federal Deposit Insurance Corporation examiners, which does provide punishment for the same offense, are extended to the former two types of examiners by sections 952 and 1243 thereof.

The remaining provisions of sections 594, 981, 1124, and 1314 of title 12, U.S.C., 1940 ed., Banks and Banking, relating to unlawful disclosure of the names of borrowers or the collateral for loans, false statements in applications for loans, overvaluation of securities, and acceptance of loans or gratuities, were separated and transferred according to subject matter to sections 218, 1014, 1906–1908 of this title, where, insofar as possible, they were consolidated with similar provisions from other sections.

Minor changes were made in phraseology.

§ 1910. Nepotism in appointment of receiver or trustee

Whoever, being a judge of any court of the United States, appoints as receiver, or trustee, any person related to such judge by consanguinity, or affinity, within the fourth degree—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on section 531 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Aug. 25, 1937, ch. 777, 50 Stat. 810).

Minor changes were made in phraseology.

§ 1911. Receiver mismanaging property

Whoever, being a receiver, trustee, or manager in possession of any property in any cause pending in any court of the United States, willfully fails to manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof, shall be fined not more than $3,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based upon section 124 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Mar. 3, 1911, ch. 231, § 65, 36 Stat. 1104).

Word "trustee" was inserted after "receiver" so as to make it clear that persons holding such office are included in the enumeration of court officers who are subject to the provisions of this section.

Changes were made in phraseology and arrangement, but without change of substance or meaning.

Other provisions of section 124 of title 28, U.S.C., 1940 ed., were retained in that title.

§ 1912. Unauthorized fees for inspection of vessels

Whoever, being an officer, employee, or agent of the United States or any agency thereof, engaged in inspection of vessels, upon any pretense, receives any fee or reward for his services, except what is allowed to him by law, shall be fined not more than $500 or imprisoned not more than six months, or both; and shall forfeit his office.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 196 (Mar. 4, 1909, ch. 321, § 107, 35 Stat. 1107).

The phrase "officer or employee of the United states or any agency thereof" was substituted for the phrase "inspector of steamboats" in view of 1946 Reorganization Plan No. 3, eff. July 16, 1946, 11 F.R. 7375, 60 Stat. 1097, abolishing inspectors and transferring their functions to the Coast Guard.

Minor changes were made in phraseology.

§ 1913. Lobbying with appropriated moneys

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 201 (July 11, 1919, ch. 6, § 6, 41 Stat. 68).

Reference to "department" and "agency" was added in three instances after the words "United States" to remove doubt as to the scope of the section. (See definitions of "department" and "agency" in section 6 of this title.)

Reference to the offense as a misdemeanor was omitted as unnecessary in view of the definitive section 1 of this title.

Words "on conviction thereof" were omitted as surplusage since punishment can be imposed only after conviction.

Minor changes were made in phraseology.

[§ 1914. Repealed. Pub.L. 87-849, § 2, Oct. 23, 1962, 76 Stat. 1126]

Exemptions. Section 2 of Pub.L. 87-849 provided that all exemptions from the provisions of this section heretofore created or authorized by statute which are in force on the effective date of the repeal of this section deemed to be exemptions from section 209 of this title except to the extent that they affect officers or employees of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, as to whom they are no longer applicable.

§ 1915. Compromise of customs liabilities

Whoever, being an officer of the United States, without lawful authority compromises or abates or attempts to compromise or abate any claim of the United States arising under the customs laws for any fine, penalty or forfeiture, or in any manner relieves or attempts to relieve any person, vessel, vehicle, merchandise or baggage therefrom, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on section 1616 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 616, 46 Stat. 757).

Designation of the offense as a felony was omitted as unnecessary in view of definitive section 1 of this title. (See reviser's note under section 550 of this title).

Words "and upon conviction thereof" were also omitted as unnecessary, since punishment could not be imposed until after conviction.

Changes were made in phraseology.

§ 1916. Unauthorized employment and disposition of lapsed appropriations

Whoever—

(1) violates the provision of section 3103 of title 5 that an individual may be employed in the civil service in an Executive department at the seat of Government only for services actually rendered in connection with and for the purposes of the appropriation from which he is paid; or

(2) violates the provision of section 5501 of title 5 that money accruing from lapsed salaries or from unused appropriations for salaries shall be covered into the Treasury of the United States;

shall be fined not more than $1,000 or imprisoned not more than one year.

(Added Pub.L. 89-554, § 3(d), Sept. 6, 1966, 80 Stat. 608.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 47 (less so much as relates to removal).	Aug. 23, 1912, ch. 350, § 5 (less so much as relates to removal), 37 Stat. 414.
.....	5 U.S.C. 50 (2d sentence, less so much as relates to removal).	

The statement of the acts prohibited is supplied from section 4 of the Act of Aug. 5, 1882, ch. 389, 22 Stat. 255, as amended June 22, 1906, ch. 3514, §§ 6, 8, 34 Stat. 449, and Sept. 23, 1950, ch. 1010, § 7, 64 Stat. 986, which is codified in sections 3103 and 5501 of title 5, United States Code.

The words "upon conviction thereof" are omitted as unnecessary because punishment can be imposed only after conviction.

§ 1917. Interference with civil service examinations

Whoever, being a member or employee of the United States Civil Service Commission or an individual in the public service, willfully and corruptly—

(1) defeats, deceives, or obstructs an individual in respect of his right of examination according to the rules prescribed by the President under title 5 for the administration of the competitive service and the regulations prescribed by the Commission under section 1302(a) of title 5;

(2) falsely marks, grades, estimates, or reports on the examination or proper standing of an individual examined;

(3) makes a false representation concerning the mark, grade, estimate, or report on the examination or proper standing of an individual examined, or concerning the individual examined; or

(4) furnishes to an individual any special or secret information for the purpose of improving or injuring the prospects or chances of an individual examined, or to be examined, being appointed, employed, or promoted;

shall, for each offense, be fined not less than $100 nor more than $1,000 or imprisoned not less than ten days nor more than one year, or both.

(Added Pub.L. 89–554, § 3(d), Sept. 6, 1966, 80 Stat. 609.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 637.	Jan. 16, 1883, ch. 27, § 5, 22 Stat. 405.

The section is rewritten to conform to the style of title 18. The words "a member or employee of the United States Civil Service Commission" are coextensive with and substituted for "Civil Service Commissioner, examiner, copyist, or messenger".

The references to actions in concert with others to violate this section are omitted in view of the crime of conspiracy contained in chapter 19 of title 18.

In paragraph (1), the words "the rules prescribed by the President under title 5 for the administration of the competitive service and the regulations prescribed by the Commission under section 1302(a) of title 5" are substituted for "any such rules or regulations" to provide the basis of reference.

The words "be deemed guilty of a misdemeanor" are omitted as unnecessary in view of the definitive section 1 of this title. (See reviser's note under 18 U.S.C. 212, 1964 ed.)

The words "and upon conviction thereof" are omitted as unnecessary because punishment can be imposed only after conviction.

The words "or both" are substituted for "or by both such fine and imprisonment".

Transfer of Functions. All functions vested by law in the United States Civil Service Commission were transferred to the Director of the Office of Personnel Management, except as otherwise specified, by section 102 of Reorg. Plan No. 2 of 1978, set out under section 1101 of Title 5, U.S.C.A., Government Organization and Employees, effective Jan. 1, 1979.

§ 1918. Disloyalty and asserting the right to strike against the Government

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

(Added Pub.L. 89–554, § 3(d), Sept. 6, 1966, 80 Stat. 609.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 118r.	Aug. 9, 1955, ch. 690, § 3, 69 Stat. 625.
	[Uncodified.]	June 29, 1956, ch. 479, § 3 (as applicable to the Act of Aug. 9, 1955, ch. 690, § 3, 69 Stat. 625), 70 Stat. 453.

The section is rewritten to conform to the style of title 18. The statement of the acts prohibited is supplied from the Act of Aug. 9, 1955, ch. 690, § 1, 69 Stat. 624, which is codified in section 7311 of title 5, United States Code.

The words "From and after July 1, 1956", appearing in the Act of June 29, 1956, are omitted as executed.

The words "shall be guilty of a felony" are omitted as unnecessary in view of the definitive section 1 of this title. (See reviser's note under section 550 of this title.)

§ 1919. False statement to obtain unemployment compensation for Federal service

Whoever makes a false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase for himself or for any other individual any payment authorized to be paid under chapter 85 of title 5 or under an agreement thereunder, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(Added Pub.L. 89–554, § 3(d), Sept. 6, 1966, 80 Stat. 609.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	42 U.S.C. 1368 (a).	Sept. 1, 1954, ch. 1212, § 4(a) "Sec. 1508(a)", 68 Stat. 1135.

The words "under chapter 85 of title 5" are substituted for "under this title" (Title XV of the Social Security Act, as amended) to reflect the codification of the Title in title 5, United States Code.

§ 1920. False statement to obtain Federal employees' compensation

Whoever makes, in an affidavit or report required by section 8106 of title 5 or in a claim for compensation under subchapter I of chapter 81 of title 5, a statement, knowing it to be false, is guilty of perjury and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(Added Pub.L. 89–554, § 3(d), Sept. 6, 1966, 80 Stat. 610.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 789.	Sept. 7, 1916, ch. 458, § 39, 39 Stat. 749. Oct. 14, 1949, ch. 691, § 103(b), 63 Stat. 855.

The word "That" in the Act of Sept. 7, 1916, is omitted as unnecessary.

The words "under section 8106 of title 5" are substituted for "under section 754 of this title" to reflect the codification of the section in title 5, United States Code. The words "a claim for compensation under subchapter I of chapter 81 of title 5" are substituted for "any claim for compensation" for clarity.

The words "or both" are substituted for "or by both such fine and imprisonment".

Minor changes in phraseology are made to conform to the style of title 18.

§ 1921. Receiving Federal employees' compensation after marriage

Whoever, being entitled to compensation under sections 8107–8113 and 8133 of title 5 and whose compensation by the terms of those sections stops or is reduced on his marriage or on the marriage of his dependent, accepts after such marriage any compensation or payment to which he is not entitled shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(Added Pub.L. 89–554, § 3(d), Sept. 6, 1966, 80 Stat. 610.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 760(L).	Sept. 7, 1916, ch. 458, § 10(L), 39 Stat. 745. Oct. 14, 1949, ch. 691, § 106(e), 63 Stat. 860.

The word "Whoever" is substituted for "If any person" to conform to the style of title 18.

The words "under sections 8107–8113 and 8133 of title 55" are substituted for "under this section or section 755 or 756 of this title" to reflect the codification of the sections in title 5, United States Code.

The words "or both" are substituted for "or by both such fine and imprisonment".

§ 1922. False or withheld report concerning Federal employees' compensation

Whoever, being an officer or employee of the United States charged with the responsibility for

making the reports of the immediate superior specified by section 8120 of title 5, willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report, or induces, compels, or directs an injured employee to forego filing of any claim for compensation or other benefits provided under subchapter I of chapter 81 of title 5 or any extension or application thereof, or willfully retains any notice, report, claim, or paper which is required to be filed under that subchapter or any extension or application thereof, or regulations prescribed thereunder, shall be fined not more than $500 or imprisoned not more than one year, or both.

(Added Pub.L. 89–554, § 3(d), Sept. 6, 1966, 80 Stat. 610.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 774(b).	Sept. 13, 1960, Pub.L. 86–767, § 206, 74 Stat. 908.

The words "the reports of the immediate superior specified in section 8120 of title 5" are substituted for "the reports specified in subsection (a) of this section" to reflect the codification of that subsection in title 5, United States Code.

The words "subchapter I of chapter 81 of title 5" and "that subchapter" are substituted for "sections 751–756, 757–781, 783–791, and 793 of this title" and "said sections", respectively, to reflect the codification of the sections in title 5, United States Code.

The words "shall be guilty of a misdemeanor" are omitted as unnecessary in view of the definitive section 1 of this title. (See reviser's note under 18 U.S.C. 212, 1964 ed.)

The words "and upon conviction thereof" are omitted as unnecessary because punishment can be imposed only after conviction.

§ 1923. Fraudulent receipt of payments of missing persons

Whoever obtains or receives any money, check, or allotment under—

(1) subchapter VII of chapter 55 of title 5; or

(2) chapter 10 of title 37;

without being entitled thereto, with intent to defraud, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(Added Pub.L. 89–554, § 3(d), Sept. 6, 1966, 80 Stat. 610.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S.Code*	*Revised Statutes and Statutes at Large*
.....	50A U.S.C. 1008	Mar. 7, 1942, ch. 166, § 8, 56 Stat. 145.

Clauses (1) and (2) are substituted for the words "under this Act" to reflect the codification of the Act. The portion of the Act which is applicable to civilian officers and employees and their dependents is codified in subchapter VII of chapter 55 of title 5, United States Code. The portion of the Act which is applicable to members of the uniformed services and their dependents is codified in chapter 10 of title 37, United States Code.

CHAPTER 95—RACKETEERING

Sec.
1951. Interference with commerce by threats or violence.
1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.
1952A. Use of interstate commerce facilities in the commission of murder-for-hire.
1952B. Violent crimes in aid of racketeering activity.
1953. Interstate transportation of wagering paraphernalia.
1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan.
1955. Prohibition of illegal gambling businesses.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened

force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 420a–420e–1 (June 18, 1934, ch. 569, §§ 1–6, 48 Stat. 979, 980; July 3, 1946, ch. 537, 60 Stat. 420).

Section consolidates sections 420a to 420e–1 of Title 18, U.S.C. 1940 ed., with changes in phraseology and arrangement necessary to effect consolidation.

Provisions designating offense as felony were omitted as unnecessary in view of definitive section 1 of this title. (See reviser's note under section 550 of this title.)

Subsection (c) of the revised section is derived from title II of the 1946 amendment. It substitutes references to specific sections of the United States Code, 1940 ed., in place of references to numerous acts of Congress, in conformity to the style of the revision bill. Subsection (c) as rephrased will preclude any construction of implied repeal of the specified acts of Congress codified in the sections enumerated.

The words "attempts or conspires so to do" were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words "participates in an attempt" and the words "or acts in concert with another or with others", in view of section 2 of this title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself.

Words "shall, upon conviction thereof," were omitted as surplusage, since punishment cannot be imposed until a conviction is secured.

References in Text. Sections 11 and 12 of Title 29, referred to in subsec. (c), were repealed. See now section 3692 of this title and rule 42(b) of the Federal Rules of Criminal Procedure, this pamphlet.

Section 164 of Title 45, referred to in subsec. (c), was repealed. See now section 5 of Title 41, U.S.C.A., Public Contracts.

Section 186 of Title 45, referred to in subsec. (c), was omitted.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Pub.L. 87–228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91–513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.)

References in Text. Section 102(6) of the Controlled Substances Act, referred to in subsec. (b)(1), is classified to section 802(6) of Title 21, U.S.C.A., Food and Drugs.

§ 1952A. Use of interstate commerce facilities in the commission of murder-for-hire

(a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than five years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

(b) As used in this section and section 1952B—

(1) "anything of pecuniary value" means anything of value in the form of money, a negotiable instrument, a commercial interest, or anything

else the primary significance of which is economic advantage; and

(2) "facility of interstate commerce" includes means of transportation and communication."

(Added Pub.L. 98-473, Title II, § 1002(a), Oct. 12, 1984, 98 Stat. 2136.)

§ 1952B. Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder or kidnaping, by imprisonment for any term of years or for life or a fine of not more than $50,000, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine of not more than $30,000, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine of not more than $20,000, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine of not more than $5,000, or both;

(5) for attempting or conspiring to commit murder or kidnaping, by imprisonment for not more than ten years or a fine of not more than $10,000, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of not more than $3,000, or both.

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

(Added Pub. L. 98-473. Title II, § 1002(a), Oct. 12, 1984, 98 Stat. 2137.)

§ 1953. Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or (4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law, or (5) the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a lottery which is authorized by the laws of that foreign country.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(e) For the purposes of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests.

(Added Pub.L. 87-218, § 1, Sept. 13, 1961, 75 Stat. 492, and amended Pub.L. 93-583, § 3, Jan. 2, 1975, 88 Stat. 1916; Pub.L. 96-90, § 2, Oct. 23, 1979, 93 Stat. 698.)

§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being—

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

(Added Pub.L. 87–420, § 17(e), Mar. 20, 1962, 76 Stat. 42, and amended Pub.L. 91–452, Title II, § 225, Oct. 15, 1970, 84 Stat. 930; Pub.L. 93–406, Title I, § 111(a)(2)(C), Sept. 2, 1974, 88 Stat. 852.)

References in Text. Title I of the Employee Retirement Income Security Act of 1974, referred to in text, is classified generally to section 1001 et seq. of Title 29, U.S.C.A., Labor.

Section 3(4) of the Employee Retirement Income Security Act of 1974, referred to in text, is classified to section 1002(4) of Title 29.

Section (3)(16) of the Employee Retirement Income Security Act of 1974, referred to in text, probably means section 3(16) of the Employee Retirement Income Security Act of 1974, which is classified to section 1002(16) of Title 29.

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to inform-

ers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

(Added Pub.L. 91–452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.)

Transfer of Functions. All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise in the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, to be terminated not later than Dec. 31, 1966. All functions of the offices so eliminated were already vested in the Secretary of the Treasury.

Priority of State Laws. Enactment of this section as not indicating an intent on the part of the Congress to occupy the field in which section operates to the exclusion of State or local law on the same subject matter, or to relieve any person of any obligation imposed by any State or local law, see section 811 of Pub.L. 91–452, set out as a note under section 1511 of this title.

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

Sec.

1961. Definitions.
1962. Prohibited racketeering activities.[1]
1963. Criminal penalties.
1964. Civil remedies.
1965. Venue and process.
1966. Expedition of actions.
1967. Evidence.
1968. Civil investigative demand.

[1] Analysis does not conform to section catchline.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivi-

sion, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95–575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95–598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677; Pub.L. 98–473, Title II, §§ 901(g), 1020, Oct. 12, 1984, 98 Stat. 2136, 2143; Pub.L. 98–547, Title II, § 205, Oct. 25, 1984, 98 Stat. 2770.)

References in Text. The Currency and Foreign Transactions Reporting Act, referred to in par. (1)(E), is Title II of Pub.L. 91–508, Oct. 26, 1970, 84 Stat. 1118, which was classified to chapter 21 (§ 1051 et seq.) of Title 31, Money and Finance, prior to its repeal and revision by Pub.L. 97–258, Sept. 13, 1982, 96 Stat. 877. See section 5311 et seq. of Title 31.

"The effective date of this chapter," referred to in par. (5), is Oct. 15, 1970.

Short Title of 1984 Amendment. Section 301 of Pub.L. 98–473, Title II, c. III, Oct. 12, 1984, 98 Stat. 2040, provided: "This title [probably means chapter III of Title II of Pub.L. 98–473] may be cited as the 'Comprehensive Forfeiture Act of 1984'."

Construction; Supersedure of Other Laws; Authority of United States Attorneys. Section 904 of Pub.L. 91–452 provided that:

"(a) The provisions of this title [Title IX of Pub.L. 91–452, which enacted this chapter and amended sections 1505, 2516 and 2517 of this title] shall be liberally construed to effectuate its remedial purposes.

"(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

"(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

"(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketeering violation of law;

"(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

"(3) institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order or process by any person."

President's Commission on Organized Crime; Taking of Testimony and Receipt of Evidence. Pub.L. 98–368, July 17, 1984, 98 Stat. 490, provided that:

"Taking of Testimony and Receipt of Evidence

"Section 1. The Commission established by the President by Executive Order 12435, dated July 28, 1983 [set out as a note under this section] (hereinafter in this joint resolution referred to as the 'Commission'), may hold hearings. The powers authorized by this resolution shall be limited to the purposes set forth in section 2 of that Executive order. The Commission, or a member of the Commission or member of the staff of the Commission designated by the Commission for such purpose, may

administer oaths and affirmations, examine witnesses, and receive evidence.

"SUBPENA POWER

"Sec. 2. (a) The Commission, or any member of the Commission when so authorized by the Commission, shall have the power to issue subpenas requiring the attendance and testimony of witnesses and the production of information relating to a matter under investigation by the Commission. A subpena may require the person to whom it is directed to produce such information at any time before such person is to testify. Such attendance of witnesses and the production of such evidence may be required from any place within the jurisdiction of the United States at any designated place of interview or hearing. A person to whom a subpena issued under this subsection is directed may for cause shown move to enlarge or shorten the time of attendance and testimony, or may move to quash or modify a subpena for the production of information if it is unreasonable or oppressive. In the case of a subpena issued for the purpose of taking a deposition upon oral examination, the person to be deposed may make any motion permitted under rule 26(c) of the Federal Rules of Civil Procedure.

"(b)(1) In case of contumacy or refusal to obey a subpena issued to a person under this section, a court of the United States within the jurisdiction of which the person is directed to appear or produce information, or within the jurisdiction of which the person is found, resides, or transacts business, may upon application by the Attorney General, issue to such person an order requiring such person to appear before the Commission, or before a member of the Commission or a member of the staff of the Commission designated by the Commission for such purpose, there to give testimony or produce information relating to the matter under investigation, as required by the subpena. Any failure to obey such order of the court may be punished by the court as a contempt thereof.

"(2) The Commission is an agency of the United States for the purpose of rule 81(a)(3) of the Federal Rules of Civil Procedure.

"(c) Process of a court to which application may be made under this section may be served in a judicial district wherein the person required to be served is found, resides, or transacts business.

"TESTIMONY OF PERSONS IN CUSTODY

"Sec. 3. A court of the United States within the jurisdiction in which testimony of a person held in custody is sought by the Commission or within the jurisdiction of which such person is held in custody, may, upon application by the Attorney General, issue a writ of habeas corpus ad testificandum requiring the custodian to produce such person before the Commission, or before a member of the Commission or a member of the staff of the Commission designated by the Commission for such purpose.

"IMMUNITY

"Sec. 4. The Commission is an agency of the United States for the purpose of part V of title 18 of the United States Code [section 6001 et seq. of this title].

"SERVICE OF PROCESS; WITNESS FEES

"Sec. 5. (a) Process and papers issued pursuant to this resolution may be served in person, by registered or certified mail, by telegraph, or by leaving a copy thereof at the residence or principal office or place of business of the person required to be served. When service is by registered or certified mail or by telegraph, the return post office receipt or telegraph receipt therefor shall be proof of service. Otherwise, the verified return by the individual making service, setting forth the manner of such service, shall be proof of service.

"(b) A witness summoned pursuant to this resolution shall be paid the same fees and mileage as are paid witnesses in the courts of the United States, and a witness whose deposition is taken and the person taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"ACCESS TO OTHER RECORDS AND INFORMATION

"Sec. 6. (a)(1) The investigative activities of the Commission are civil or criminal law enforcement activities for the purposes of section 552a(b)(7) of title 5, United States Code, [Title 5, Government Organization and Employees], except that section 552a(c)(3) shall apply after the termination of the Commission.

"(2) The Commission is a Government authority, and an investigation conducted by the Commission is a law enforcement inquiry, for the purposes of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.) [section 3401 et seq. of Title 12, Banks and Banking]. Any delay authorized by court order in the notice required under that Act shall not exceed the life of the Commission, including any extension thereof. Notwithstanding a delay authorized by court order, if the Commission elects to publicly disclose the information in hearings or otherwise, it shall give notice required under the Right to Financial Privacy Act a reasonable time in advance of such disclosure.

"(b) For the purposes of section 2517 of title 18, United States Code [section 2517 of this title], and as limited by subsection (c), the members and members of the staff of the Commission are investigative or law enforcement officers, except that in the case of a disclosure to or by any member or member of the staff of the Commission of any of the contents of a communication intercepted under section 2516(1) of such title [section 2516(1) of this title], such disclosure may be made only after the Attorney General or the Attorney General's designee has had an opportunity to determine that such disclosure may jeopardize Federal law enforcement interests and has not made that determination, and in the case of a disclosure to or by any member or member of the staff of the Commission of any of the contents of a communication intercepted under section 2516(2) of such title [section 2516(2) of this title], such disclosure may be made only after the appropriate State official has had an opportunity to make a determination that such disclosure may jeopardize State law enforcement interests and has not made that determination.

"(c)(1) A person to whom disclosure of information is made under this section shall use such information solely in the performance of such person's duties for the Com-

mission and shall make no disclosure of such information except as provided for by this joint resolution, or as otherwise authorized by law.

"(2) A disclosure or use by a member or a member of the staff of the Commission of the contents of a communication intercepted under chapter 119 of title 18 of the United States Code [section 2510 et seq. of this title] may be made solely in the course of carrying out the functions of the Commission as such functions were established by Executive Order 12435, dated July 28, 1983.

"FEDERAL PROTECTION FOR MEMBERS AND STAFF OF THE COMMISSION

"Sec. 7. Conduct, which if directed against a United States attorney would violate section 111 or 1114 of title 18, United States Code [section 111 or 1114 of this title], shall, if directed against a member of the Commission or a member of the staff of the Commission, be subject to the same punishments as are provided by such sections for such conduct.

"CLOSURE OF MEETINGS

"Sec. 8. The functions of the President under section 10(d) of the Federal Advisory Committee Act (5 U.S.C. App. 10(d)) [set out in the Appendix to Title 5, Government Organization and Employees] shall be performed by the Chairman of the Commission.

"RULES AND PROCEDURES OF THE COMMISSION

"Sec. 9. (a) The Commission shall adopt rules and procedures (1) to govern its proceedings; (2) to provide for the security of records, documents, information, and other materials in its custody and of its proceedings; (3) to prevent unauthorized disclosure of information and materials disclosed to it in the course of its inquiry; (4) to provide the right to counsel to all witnesses examined pursuant to subpena; and (5) to accord the full protection of all rights secured and guaranteed by the Constitution of the United States.

"(b) No information in the possession of the Commission shall be disclosed by any member or employee of the Commission to any person who is not a member or employee of the Commission, except as authorized by the Commission and by law.

"(c) The term 'employee of the Commission' means a person (1) whose services have been retained by the Commission, (2) who has been specifically designated by the Commission as authorized to have access to information in the possession of the Commission, and (3) who has agreed in writing and under oath to be bound by the rules of the Commission, the provisions of this resolution, and other provisions of law relating to the nondisclosure of information.

"EFFECTIVE DATES OF RESOLUTION

"Sec. 10. This joint resolution shall take effect on the date of enactment [July 17, 1984] and shall remain in effect until the expiration of the Commission, including any extensions thereof, or two years, whichever event occurs earlier."

EXECUTIVE ORDER NO. 12435

July 28, 1983, 48 F.R. 34723

PRESIDENT'S COMMISSION ON ORGANIZED CRIME

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish, in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. I) [Appendix 2 of Title 5, Government Organization and Employees], an advisory committee on organized crime, it is hereby ordered as follows:

Section 1. (a) There is established the President's Commission on Organized Crime. The Commission shall be composed of not more than twenty members appointed or designated by the President.

(b) The President shall designate a Chairman from among the members of the Commission.

Sec. 2. (a) The Commission shall make a full and complete national and region-by-region analysis of organized crime; define the nature of traditional organized crime as well as emerging organized crime groups, the sources and amounts of organized crime's income, and the uses to which organized crime puts its income; develop in-depth information on the participants in organized crime networks; and evaluate Federal laws pertinent to the effort to combat organized crime. The Commission shall advise the President and the Attorney General with respect to its findings and actions which can be undertaken to improve law enforcement efforts directed against organized crime, and make recommendations concerning appropriate administrative and legislative improvements and improvements in the administration of justice.

(b) The Commission shall report to the President from time to time as requested and shall submit its final report by March 1, 1986.

Sec. 3. **Administration.** (a) The heads of Executive agencies shall, to the extent permitted by law, provide the Commission such information as it may require for purposes of carrying out its functions.

(b) Members of the Commissions shall serve without compensation for their work on the Commission. However, members appointed from among private citizens of the United States or who are Members of Congress or Federal Judges may, subject to the availability of funds, be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the government service (5 U.S.C. 5701–5707) [sections 5701 to 5707 of Title 5, Government Organization and Employees].

(c) The Attorney General shall, to the extent permitted by law, provide the Commission with such administrative services, funds, facilities, staff and other support services as may be necessary for the performance of its functions.

Sec. 4. **General.** (a) Notwithstanding any other Executive Order, the functions of the President under the Federal Advisory Committee Act, as amended [Appendix 2 of Title 5, Government Organization and Employees], except that of reporting to the Congress, which are applicable to the Commission, shall be performed by the Attorney General, in accordance with guidelines and pro-

cedures established by the Administrator of General Services.

(b) The Commission shall, unless otherwise extended, terminate two years from the date of this Order.

RONALD REAGAN

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

[(d) Repealed. Pub.L. 98–473, Title II, § 2301(b), Oct. 12, 1983, 98 Stat. 2192]

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(*l*) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf,

and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943, and amended Pub.L. 98–473, Title II, §§ 302, 2301(a)–(c), Oct. 12, 1984, 98 Stat. 2040, 2192.)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943, and amended Pub.L. 98–620, Title IV, § 402(24)(A), Nov. 8, 1984, 98 Stat. 3359.)

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944, and amended Pub.L. 98-620, Title IV, § 402(24)(B), Nov. 8, 1984, 98 Stat. 3359.)

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made

thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material

delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 944.)

CHAPTER 97—RAILROADS

Sec.

1991. Entering train to commit crime.
1992. Wrecking trains.

Historical and Revision Notes

This chapter does not include motor busses, interstate trucking facilities or airplanes within the protection of existing law. Motor busses and trucks already carry a huge amount of interstate commerce. It is reasonable to presume that much interstate freight and express will soon be carried by air.

Attention is directed to the consideration of the extension of the laws now applicable only to railroads to these other interstate facilities. 80th Congress House Report No. 304.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 1991. Entering train to commit crime

Whoever, in any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States, willfully and maliciously trespasses upon or enters upon any railroad train, railroad car, or railroad locomotive, with the intent to commit murder or robbery, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever, within such jurisdiction, willfully and maliciously trespasses upon or enters upon any railroad train, railroad car, or railroad locomotive, with intent to commit any unlawful violence upon or against any passenger on said train, or car, or upon or against any engineer, conductor, fireman, brakeman, or any officer or employee connected with said locomotive, train, or car, or upon or against any express messenger or mail agent on said train or in any car thereof, or to commit any crime or offense against any person or property thereon, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Upon the trial of any person charged with any offense set forth in this section, it shall not be necessary to set forth or prove the particular person against whom it was intended to commit the offense, or that it was intended to commit such offense against any particular person.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 522 (Mar. 4, 1909, ch. 321, § 322, 35 Stat. 1150).

After the word "Whoever" the following was inserted: "in any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States" as based upon the express provisions of title 18, U.S.C., 1940 ed., § 511, wherein this section is made applicable only "in any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States."

Words "whoever shall counsel, aid, abet, or assist in the perpetration of any of the offenses set forth in this section shall be deemed to be a principal therein" were omitted as unnecessary. Such persons are made principals by section 2 of this title.

Minor changes also were made in phraseology.

§ 1992. Wrecking trains

Whoever willfully derails, disables, or wrecks any train, engine, motor unit, or car used, operated, or employed in interstate or foreign commerce by any railroad; or

Whoever willfully sets fire to, or places any explosive substance on or near, or undermines any tunnel, bridge, viaduct, trestle, track, signal, station, depot, warehouse, terminal, or any other way, structure, property, or appurtenance used in the operation of any such railroad in interstate or foreign commerce, or otherwise makes any such tunnel, bridge, viaduct, trestle, track, signal, station, depot, warehouse, terminal, or any other way, structure, property, or appurtenance unworkable or unusable or hazardous to work or use, with the intent to derail, disable, or wreck a train, engine, motor unit, or car used, operated, or employed in interstate or foreign commerce; or

Whoever willfully attempts to do any of the aforesaid acts or things—

Shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

Whoever is convicted of any such crime, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, if the court in its discretion shall so order.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 412a (June 8, 1940, ch. 286, 54 Stat. 255).

First clause in second paragraph of said section 412a of title 18, U.S.C., 1940 ed., was omitted as covered by section 3231 of this title.

Words "and on conviction thereof" were omitted as surplusage since punishment cannot be imposed until a conviction is secured.

CHAPTER 99—RAPE

Sec.
2031. Special maritime and territorial jurisdiction.
2032. Carnal knowledge of female under 16.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2031. Special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer death, or imprisonment for any term of years or for life.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 457 (Mar. 4, 1909, ch. 321, § 278, 35 Stat. 1143).

Words "within the special maritime and territorial jurisdiction of the United States" were added to restrict the place of the offense to those places described in section 451 of title 18, U.S.C., 1940 ed., now section 7 of this title.

Minor changes were made in phraseology.

§ 2032. Carnal knowledge of female under 16

Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 458 (Mar. 4, 1909, ch. 321, § 279, 35 Stat. 1143).

Words "within the special maritime and territorial jurisdiction of the United States" were added to restrict the place of the offense to those places described in section 451 of title 18, U.S.C, 1940 ed., now section 7 of this title.

Words "not his wife" were inserted and word "unlawfully" was deleted to make section more explicit.

Words "or shall be accessory to such carnal and unlawful knowledge before the fact" were deleted as unnecessary in view of section 2 of this title defining principals.

Minor changes were also made in phraseology.

CHAPTER 101—RECORDS AND REPORTS

Sec.
2071. Concealment, removal, or mutilation generally.
2072. False crop reports.
2073. False entries and reports of moneys or securities.
2074. False weather reports.
2075. Officer failing to make returns or reports.
2076. Clerk of United States District Court.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2071. Concealment, removal, or mutilation generally

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 234, 235 (Mar. 4, 1909, ch. 321, §§ 128, 129, 35 Stat. 1111, 1112).

Section consolidates sections 234 and 235 of title 18, U.S.C., 1940 ed.

Reference in subsection (a) to intent to steal was omitted as covered by section 641 of this title.

Minor changes were made in phraseology.

§ 2072. False crop reports

Whoever, being an officer or employee of the United States or any of its agencies, whose duties require the compilation or report of statistics or information relating to the products of the soil, knowingly compiles for issuance, or issues, any false statistics or information as a report of the United States or any of its agencies, shall be fined

not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 215 (Mar. 4, 1909, ch. 321, § 124, 35 Stat. 1111).

Words "or any of its agencies" were inserted after "United States" so as to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

Minor changes were made in phraseology.

§ 2073. False entries and reports of moneys or securities

Whoever, being an officer, clerk, agent, or other employee of the United States or any of its agencies, charged with the duty of keeping accounts or records of any kind, with intent to deceive, mislead, injure, or defraud, makes in any such account or record any false or fictitious entry or record of any matter relating to or connected with his duties; or

Whoever, being an officer, clerk, agent, or other employee of the United States or any of its agencies, charged with the duty of receiving, holding, or paying over moneys or securities to, for, or on behalf of the United States, or of receiving or holding in trust for any person any moneys or securities, with like intent, makes a false report of such moneys or securities—

Shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 189 (Mar. 4, 1911, ch. 270, 36 Stat. 1355).

Words "or any of its agencies" were inserted after "United States" so as to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

References to persons aiding and abetting were omitted. Such persons are principals under section 2 of this title.

Minor verbal changes were made.

§ 2074. False weather reports

Whoever knowingly issues or publishes any counterfeit weather forecast or warning of weather conditions falsely representing such forecast or warning to have been issued or published by the Weather Bureau, United States Signal Service, or other branch of the Government service, shall be fined not more than $500 or imprisoned not more than ninety days, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 117 (Mar. 4, 1909, ch. 321, § 61, 35 Stat. 1100).

Minor verbal changes were made.

Change of Name. The United States Signal Service is now the Signal Corps which is a branch of the Army. See section 3063 of Title 10, U.S.C.A., Armed Forces.

The Weather Bureau is now the National Weather Service.

§ 2075. Officer failing to make returns or reports

Every officer who neglects or refuses to make any return or report which he is required to make at stated times by any Act of Congress or regulation of the Department of the Treasury, other than his accounts, within the time prescribed by such Act or regulation, shall be fined not more than $1,000.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 188, (Mar. 4, 1909, ch. 321, § 101, 35 Stat. 1107).

§ 2076. Clerk of United States District Court

Whoever, being a clerk of a district court of the United States, willfully refuses or neglects to make or forward any report, certificate, statement, or document as required by law, shall be fined not more than $1,000 or imprisoned not more than one year.

HISTORICAL AND REVISION NOTES

Based on section 522 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Feb. 22, 1875, ch. 95, § 6, 18 Stat. 334).

The reference tot he offense as a misdemeanor was omitted as unnecessary in view of the definition of "misdemeanor" in section 1 of this title.

The last sentence providing that conviction should not be a condition precedent to removal from office was omitted as unnecessary.

Minor changes were made in phraseology.

CHAPTER 102—RIOTS

Sec.
2101. Riots.
2102. Definitions.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2101. Riots

(a)(1) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—

(A) to incite a riot; or

(B) to organize, promote, encourage, participate in, or carry on a riot; or

(C) to commit any act of violence in furtherance of a riot; or

(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot;

and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph—

Shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(b) In any prosecution under this section, proof that a defendant engaged or attempted to engage in one or more of the overt acts described in subparagraph (A), (B), (C), or (D) of paragraph (1) of subsection (a) and (1) has traveled in interstate or foreign commerce, or (2) has use of or used any facility of interstate or foreign commerce, including but not limited to, mail, telegraph, telephone, radio, or television, to communicate with or broadcast to any person or group of persons prior to such overt acts, such travel or use shall be admissible proof to establish that such defendant traveled in or used such facility of interstate or foreign commerce.

(c) A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

(d) Whenever, in the opinion of the Attorney General or of the appropriate officer of the Department of Justice charged by law or under the instructions of the Attorney General with authority to act, any person shall have violated this chapter, the Department shall proceed as speedily as possible with a prosecution of such person hereunder and with any appeal which may lie from any decision adverse to the Government resulting from such prosecution; or in the alternative shall report in writing, to the respective Houses of the Congress, the Department's reason for not so proceeding.

(e) Nothing contained in this section shall be construed to make it unlawful for any person to travel in, or use any facility of, interstate or foreign commerce for the purpose of pursuing the legitimate objectives of organized labor, through orderly and lawful means.

(f) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section; nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law.

(Added Pub.L. 90–284, Title I, § 104(a), Apr. 11, 1968, 82 Stat. 75.)

§ 2102. Definitions

(a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened acts or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.

(b) As used in this chapter, the term "to incite a riot", or "to organize, promote, encourage, participate in, or carry on a riot", includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.

(Added Pub.L. 90–284, Title I, § 104(a), Apr. 11, 1968, 82 Stat. 76.)

CHAPTER 103—ROBBERY AND BURGLARY

Sec.

2111. Special maritime and territorial jurisdiction.
2112. Personal property of United States.
2113. Bank robbery and incidental crimes.
2114. Mail, money, or other property of United States.
2115. Post office.
2116. Railway or steamboat post office.
2117. Breaking or entering carrier facilities.
2118. Robberies and burglaries involving controlled substances.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct.12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2111. Special maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 463 (Mar. 4, 1909, ch. 321, § 284, 35 Stat. 1144).

Words "within the special maritime and territorial jurisdiction of the United States" were added to restrict the place of the offense to those places described in section 451 of title 18, U.S.C., 1940 ed., now section 7 of this title.

Minor changes were made in phraseology.

§ 2112. Personal property of United States

Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 99 (Mar. 4, 1909, ch. 321, § 46, 35 Stat. 1097).

That portion of said section 99 relating to felonious taking was omitted as covered by section 641 of this title.

The punishment by fine of not more than $5,000 or imprisoned not more than 10 years, or both, was changed to harmonize with section 2111 of this title. The 15-year penalty is not excessive for an offense of this type.

Minor verbal change was made.

§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are

insured by the Administrator of the National Credit Union Administration.

(As amended Aug. 3, 1950, c. 516, § 1, 64 Stat. 394; Apr. 8, 1952, c. 164, 66 Stat. 46; Sept. 22, 1959, Pub.L. 86-354, § 2, 73 Stat. 639; Oct. 19, 1970, Pub.L. 91-468, § 8, 84 Stat. 1017; Oct. 12, 1984, Pub.L. 98-473, Title II, § 1106, 98 Stat. 2145.)

HISTORICAL AND REVISION NOTES

Based on sections 588a, 588b, 588c, of title 12, U.S.C., 1940 ed., Banks and Banking (May 18, 1934, ch. 304, §§ 1, 2, 3, 48 Stat. 783; Aug. 23, 1935, ch. 614, § 333, 49 Stat. 720; Aug. 24, 1937, ch. 747, 50 Stat. 749; June 29, 1940, ch. 455, 54 Stat. 695).

Section consolidates sections 588a, 588b, and 588c of title 12, U.S.C., 1940 ed., Banks and Banking, as suggested by United States Attorney Clyde O. Eastus, of Fort Worth, Tex.

Words "felony or larceny" in subsection (a) were changed to "felony affecting such bank and in violation of any statute of the United States, or any larceny".

Use of term "felony" without limitation caused confusion as to whether a common law, State, or Federal felony was intended. Change conforms with *Jerome v. U.S.* (1943, 63 S.Ct. 483, 318 U.S. 101, 87 L.Ed. 640): "§ 1(a) [§ 588b(a) of title 12, U.S.C., 1940 ed., Banks and Banking] is not deprived of vitality if it is interpreted to exclude State felonies and to include only those Federal felonies which affect banks protected by the Act.

Minimum punishment provisions were omitted from subsection (c). (See reviser's note under section 203 of this title.) Also the provisions of subsection (b) measuring the punishment by the amount involved were extended and made applicable to the receiver as well as the thief. There seems no good reason why the thief of less than $100 should be liable to a maximum of imprisonment for one year and the receiver subject to 10 years.

The figures "100" were substituted for "50" in view of the fact that the present worth of $100 is less than the value of $50 when that sum was fixed as the dividing line between petit larceny and grand larceny.

The attention of Congress is directed to the mandatory minimum punishment provisions of sections 2113(e) and 2114 of this title. These were left unchanged because of the controversial question involved. Such legislative attempts to control the discretion of the sentencing judge are contrary to the opinions of experienced criminologists and criminal law experts. They are calculated to work manifest injustice in many cases.

Necessary minor translations of section references, and changes in phraseology, were made.

References in Text. Federal savings and loan association, referred to in subsec. (g), deemed also a reference to Federal mutual savings bank, see section 1462 of Title 12, U.S.C.A., Banks and Banking.

Section 401 of the National Housing Act, referred to in subsec. (g), is classified to section 1724 of Title 12.

Section 2 of the Federal Credit Union Act, referred to in subsec. (g), is classified to section 1752 of Title 12.

§ 2114. Mail, money or other property of United States

Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

Amendment of Section

Section 223(d) of Pub.L. 98-473, Oct. 12, 1984, 98 Stat. 2028, provided that this section is amended by inserting "not more than" after "imprisoned" effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 320 (Mar. 4, 1909, ch. 321, § 197, 35 Stat. 1126; Aug. 26, 1935, ch. 694, 49 Stat. 867).

The attention of Congress is directed to the mandatory minimum punishment provisions of sections 2113(e) and 2114 of this title. These were left unchanged because of the controversial question involved. Such legislative attempts to control the discretion of the sentencing judge are contrary to the opinions of experienced criminologists and criminal law experts. They are calculated to work manifest injustice in many cases.

Minor changes were made in phraseology.

§ 2115. Post office

Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building or part thereof, so used, any larceny or other depredation, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 315 (Mar. 4, 1909, ch. 321, § 192, 335 Stat. 1125).

Mandatory punishment provisions were rephrased in the alternative.

Minor change in phraseology was made.

§ 2116. Railway or steamboat post office

Whoever, by violence, enters a post-office car, or any part of any car, steamboat, or vessel, assigned

to the use of the mail service, or willfully or maliciously assaults or interferes with any postal clerk in the discharge of his duties in connection with such car, steamboat, vessel, or apartment thereof, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 316 (Mar. 4, 1909, ch. 321, § 193, 35 Stat. 1125).

Reference to persons aiding or assisting was deleted as unnecessary because such persons are made principals by section 2 of this title.

Minor changes were made in phraseology.

§ 2117. Breaking or entering carrier facilities

Whoever breaks the seal or lock of any railroad car, vessel, aircraft, motortruck, wagon or other vehicle or of any pipeline system, containing interstate or foreign shipments of freight or express or other property, or enters any such vehicle or pipeline system with intent in either case to commit larceny therein, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

(As amended May 24, 1949, c. 139, § 44, 63 Stat. 96; Oct. 14, 1966, Pub.L. 89-654, § 2(a)-(c), 80 Stat. 904, 905.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 409 (Feb. 13, 1913, ch. 50, § 1, 37 Stat. 670; Jan. 28, 1925, ch. 102, 43 Stat. 793; Jan. 21, 1933, ch. 16, 47 Stat. 773; July 24, 1946, ch. 606, 60 Stat. 656).

Other provisions of section 409 of title 18, U.S.C., 1940 ed., were incorporated in sections 659 and 660 of this title.

Minor changes were made in phraseology.

1949 ACT

This section [section 44] conforms section 2117 of title 18, U.S.C., more closely with the original law from which it was derived, and with section 659 of such title.

EXECUTIVE ORDER NO. 11836

Jan. 27, 1975, 40 F.R. 4255

TRANSPORTATION CARGO SECURITY PROGRAM

Theft of cargo has emerged during this decade as a serious threat to the reliability, efficiency, and integrity of the Nation's commerce. The total cost of theft-related cargo losses from our Nation's transportation system is now estimated to be in excess of one billion dollars annually. These losses seriously erode industry profits, result in higher prices for consumer goods, and provide support for unlawful activities.

In recognition of this problem, the Secretary of Transportation, at Presidential direction, has provided leadership, guidance, and technical assistance in coordinating the efforts of Federal agencies and the transportation industry in the search for solutions. Through the cooperative efforts of the Federal agencies, an effective National Cargo Security Program has been developed and is now being implemented on a voluntary basis in cooperation with the transportation industry, and with the support of State and local governments, shippers, consignees, organized labor, and insurers.

To assure more effective Federal leadership in this effort, I am directing that certain additional responsibilities be carried out by the Secretary of Transportation, delineating the functions and responsibilities of the other Federal departments and agencies with respect to the National Cargo Security Program, urging full participation and cooperation in the program by the independent regulatory agencies and all Federal departments and agencies, and requesting the Secretary of Transportation to submit to me on March 31, 1976, a full evaluation of the effectiveness of the Federal program.

Now, THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

Section. 1. Responsibilities of the Secretary of Transportation. The Secretary of Transportation shall be responsible for:

(1) assisting the transportation industry by planning, developing, and testing cargo security measures and by providing technical assistance and arranging demonstration projects related thereto;

(2) coordinating the activities of Federal departments and agencies relating to the prevention of cargo theft, and studying means by which Government agencies can, through the procurement of transportation services, improve the cargo security programs of common carriers;

(3) collecting and analyzing cargo loss data for all modes of transportation, and preparing and publishing periodic reports on the extent and nature of theft-related cargo losses, local and national loss trends, and other special analyses useful to the development of theft prevention measures; and

(4) issuing, after coordination with the interested Federal departments and agencies and after opportunity for public comment, Cargo Security Advisory Standards for the prevention of cargo losses by any elements of the transportation industry, including shippers and receivers.

Sec. 2. Responsibilities of the Attorney General. The Attorney General shall be responsible for:

(1) developing and conducting programs designed to promote the coordination of Federal, State, and local law enforcement efforts against criminal activity relating to cargo thefts; and

(2) supporting, to the extent possible and appropriate, the provision of financial assistance to State and local law enforcement organizations for the establishment and maintenance of cargo theft prevention programs and for the investigation, prosecution, and prevention of cargo theft.

Sec. 3. Responsibilities of the Secretary of the Treasury. The Secretary of the Treasury shall be responsible for:

(1) Fostering the security of international cargo in customs custody within ports of entry and in its movement and storage in bond;

(2) Investigating the theft of cargo stolen from customs custody and, consistent with the responsibilities of the Bureau of Alcohol, Tobacco and Firearms, the theft of firearms, ammunition, explosives, tobacco, and alcohol;

(3) Analyzing cargo theft reports to identify theft-conducive practices and theft-prone facilities employed in the handling of cargo controlled by the Customs Service at ports of entry, providing for the implementation of cargo security advisory standards with respect to that cargo, and initiating other corrective measures as appropriate; and

(4) Coordinating with the Department of Transportation and other interested Federal departments and agencies measures being proposed to improve the security of cargo at facilities controlled by the Customs Service.

Sec. 4. Recommended Actions by the Transportation Regulatory Agencies. The Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission are urged, in exercising their regulatory responsibilities, to recognize and consider the problem of theft-related cargo losses and encourage preventive measures, and to continue to cooperate with the Department of Transportation by:

(1) Developing cargo theft reporting systems affording full opportunity for presentation of views by the public, the Department of Transportation, other interested Federal departments and agencies, and those elements of the transportation industry from which reports would be required;

(2) Obtaining cargo loss data from carriers, freight forwarders, and terminal operators (including such information as cargo lost, missing, stolen, presumed stolen, or damaged as a result of theft); and

(3) Providing the Department of Transportation with the cargo loss data collected in a form that will permit both general and detailed analyses and preparation of reports on an intermodal and national basis.

Sec. 5. Recommended Action by Federal Departments and Agencies. All Federal departments and agencies, in their procurement of transportation services for good and commodities, are urged to encourage carriers to adopt cargo theft prevention measures.

Sec. 6. Report and Recommendations. The Secretary of Transportation shall submit to me on March 31, 1976, and annually thereafter, a report evaluating and making recommendations concerning the effectiveness of the Federal program prescribed by this Order in reducing theft-related cargo losses.

GERALD R. FORD

§ 2118. Robberies and burglaries involving controlled substances

(a) Whoever takes or attempts to take from the person or presence of another by force or violence or by intimidation any material or compound containing any quantity of a controlled substance belonging to or in the care, custody, control, or possession of a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822) shall, except as provided in subsection (c), be fined not more than $25,000 or imprisoned not more than twenty years, or both, if (1) the replacement cost of the material or compound to the registrant was not less than $500, (2) the person who engaged in such taking or attempted such taking traveled in interstate or foreign commerce or used any facility in interstate or foreign commerce to facilitate such taking or attempt, or (3) another person was killed or suffered significant bodily injury as a result of such taking or attempt.

(b) Whoever, without authority, enters or attempts to enter, or remains in, the business premises or property of a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822) with the intent to steal any material or compound containing any quantity of a controlled substance shall, except as provided in subsection (c), be fined not more than $25,000 or imprisoned not more than twenty years, or both, if (1) the replacement cost of the controlled substance to the registrant was not less than $500, (2) the person who engaged in such entry or attempted such entry or who remained in such premises or property traveled in interstate or foreign commerce or used any facility in interstate or foreign commerce to facilitate such entry or attempt or to facilitate remaining in such premises or property, or (3) another person was killed or suffered significant bodily injury as a result of such entry or attempt.

(c)(1) Whoever in committing any offense under subsection (a) or (b) assaults any person, or puts in jeopardy the life of any person, by the use of a dangerous weapon or device shall be fined not more than $35,000 and imprisoned for not more than twenty-five years.

(2) Whoever in committing any offense under subsection (a) or (b) kills any person shall be fined not more than $50,000 or imprisoned for any term of years or life, or both.

(d) If two or more persons conspire to violate subsection (a) or (b) of this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be fined not

more than $25,000 or imprisoned not more than ten years or both.

(e) For purposes of this section—

(1) the term "controlled substance" has the meaning prescribed for that term by section 102 of the Controlled Substances Act;

(2) the term "business premises or property" includes conveyances and storage facilities; and

(3) the term "significant bodily injury" means bodily injury which involves a risk of death, significant physical pain, protracted and obvious disfigurement, or a protracted loss or impairment of the function of a bodily member, organ, or mental or sensory faculty.

(Added Pub.L. 98–305, § 2, May 31, 1984, 98 Stat. 221.)

References in Text. Section 102 of the Controlled Substances Act, referred to in subsec. (e)(1), is section 102 of Pub.L. 91–518, Oct. 27, 1970, 84 Stat. 1242 which is classified to section 802 of Title 21, Food and Drugs.

Short Title. Section 1 of Pub.L. 98–305, May 31, 1984, 98 Stat. 221, provided that "this Act [Pub.L. 98–305] may be cited as the 'Controlled Substance Registrant Protection Act of 1984'."

Report to Congress. Attorney General, for first three years after May 31, 1984, to submit to Congress a report with respect to enforcement activities relating to offenses under this section, see section 4 of Pub.L. 305, May 31, 1984, 98 Stat. 222, set out as a note under section 522 of Title 28, Judiciary and Judicial Procedure.

CHAPTER 105—SABOTAGE

Sec.

2151. Definitions.
2152. Fortifications, harbor defenses, or defensive sea areas.
2153. Destruction of war material, war premises, or war utilities.
2154. Production of defective war material, war premises, or war utilities.
2155. Destruction of national-defense materials, national-defense premises or national-defense utilities.
2156. Production of defective national-defense material, national-defense premises or national-defense utilities.
2157. Temporary extension of sections 2153 and 2154.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2151. Definitions

As used in this chapter:

The words "war material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all articles, parts or ingredients, intended for, adapted to, or suitable for the use of the United States or any associate nation, in connection with the conduct of war or defense activities.

The words "war premises" include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States, or any associate nation.

The words "war utilities" include all railroads, railways, electric lines, roads of whatever description, any railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, aircraft, airfields, air lanes, and fixtures or appurtenances thereof, or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas or elsewhere; and all air-conditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which air, water or gas is being furnished, or may be furnished, to any war premises or to the Armed Forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures, and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply air, water, light, heat, power, or facilities of communication to any war premises or to the Armed Forces of the United States, or any associate nation.

The words "associate nation" mean any nation at war with any nation with which the United States is at war.

The words "national-defense material" include arms, armament, ammunition, livestock, forage, forest products and standing timber, stores of clothing, air, water, food, foodstuffs, fuel, supplies, munitions, and all other articles of whatever description and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

The words "national-defense premises" include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other installations of the Armed Forces of the United States.

The words "national-defense utilities" include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, aircraft, airfields, air lanes, and fixtures or appurtenances thereof, or any other means of transportation whatsoever, whereon or whereby such national-defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas or elsewhere; and all air-conditioning systems, dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which air, water, or gas may be furnished to any national-defense premises or to the Armed Forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply air, water, light, heat, power, or facilities of communication to any national-defense premises or to the Armed Forces of the United States.

(As amended June 30, 1953, c. 175, §§ 2, 7, 67 Stat. 133, 134; Sept. 3, 1954, c. 1261, Title I, § 101, 68 Stat. 1216.)

HISTORICAL AND REVISION NOTES

Based on sections 101, 104, of title 50, U.S.C., 1940 ed., War and National Defense (Apr. 20, 1918, ch. 59, §§ 1, 4, 40 Stat. 533; Nov. 30, 1940, ch. 926, 54 Stat. 1220; Aug. 21, 1941, ch. 388, 55 Stat. 655; Dec. 24, 1942, ch. 824, 56 Stat. 1087).

Section consolidated definitive sections 101 and 104 of title 50, U.S.C., 1940 ed., War and National Defense.

Words "As used in this chapter" were inserted at beginning for brevity.

Definition of "United States", was omitted as covered by section 5 of this title.

Minor changes were made in phraseology and translations.

§ 2152. Fortifications, harbor defenses, or defensive sea areas

Whoever willfully trespasses upon, injures, or destroys any of the works or property or material of any submarine mine or torpedo or fortification or harbor-defense system owned or constructed or in process of construction by the United States; or

Whoever willfully interferes with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system; or

Whoever knowingly, willfully, or wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the President, for purposes of national defense, may from time to time establish by executive order—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 96 (Mar. 4, 1909, ch. 321, § 44, 35 Stat. 1097; Mar. 4, 1917, ch. 180, 39 Stat. 1194; May 22, 1917, ch. 20, § 19, 40 Stat. 89).

Jurisdiction and venue provisions were omitted as unnecessary and inconsistent with Rule 18 of the Federal Rules of Criminal Procedure providing for prosecution where the offense is committed, and section 3238 of this title providing that trial of offenses committed outside any district shall be in the district where the offender is found, or into which he is first brought.

Words "on conviction thereof" were omitted as surplusage as punishment cannot be imposed until conviction is had.

Minor changes were made in phraseology.

§ 2153. Destruction of war material, war premises, or war utilities

(a) Whoever, when the United States is at war, or in times of national emergency as declared by the President or by the Congress, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years, or both.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

(As amended June 30, 1953, c. 175, §§ 2, 7, 67 Stat. 133, 134; Sept. 3, 1954, c. 1261, Title I, § 102, 68 Stat. 1217.)

HISTORICAL AND REVISION NOTES

Based on section 102 of title 50, U.S.C., 1940 ed., War and National Defense (Apr. 20, 1918, ch. 59, § 2, 40 Stat. 534).

"As herein defined" was deleted as surplusage.

The conspiracy provisions are new. Their addition to the section was strongly urged by the Criminal Division of the Department of Justice, considering the gravity of the substantive offense as evidenced by the prescribed punishment therefor. The punishment provisions of the general conspiracy statute, section 371 of this title, are inadequate.

Words "upon conviction thereof" were omitted as unnecessary since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

§ 2154. Production of defective war material, war premises, or war utilities

(a) Whoever, when the United States is at war, or in times of national emergency as declared by the President or by the Congress, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully makes, constructs, or causes to be made or constructed in a defective manner, or attempts to make, construct, or cause to be made or constructed in a defective manner any war material, war premises or war utilities, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, war premises or war utilities, shall be fined not more than $10,000 or imprisoned not more than thirty years, or both.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

(As amended June 30, 1953, c. 175, §§ 2, 7, 67 Stat. 133, 134; Sept. 3, 1954, c. 1261, Title I, § 103, 68 Stat. 1218.)

HISTORICAL AND REVISION NOTES

Based on section 103 of title 50, U.S.C., 1940 ed., War and National Defense (Apr. 20, 1918, ch. 59, § 3, 40 Stat. 534).

The conspiracy provisions are new. Their addition to the section was strongly urged by the Criminal Division of the Department of Justice, considering the gravity of the substantive offense as evidenced by the prescribed punishment therefor. The punishment provisions of the general conspiracy statute, section 371 of this title, are inadequate.

Words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

§ 2155. Destruction of national-defense materials, national-defense premises or national-defense utilities

(a) Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

(As amended Sept. 3, 1954, c. 1261, Title I, § 104, 68 Stat. 1218.)

HISTORICAL AND REVISION NOTES

Based on section 105 of title 50, U.S.C., 1940 ed., War and National Defense (Apr. 20, 1918, ch. 59, § 5, as added Nov. 30, 1940, ch. 926, 54 Stat. 1221).

Words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

§ 2156. Production of defective national-defense material, national-defense premises or national-defense utilities

(a) Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully makes, constructs, or attempts to make or construct in a defective manner, any national-defense material, national-defense premises or national-defense utilities, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such national-defense material, national-defense premises or national-defense utilities, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in subsection (a) of this section.

(As amended Sept. 3, 1954, c. 1261, Title I, § 105, 68 Stat. 1218.)

HISTORICAL AND REVISION NOTES

Based on section 106 of title 50, U.S.C., 1940 ed., War and National Defense (Apr. 20, 1918, ch. 59, § 6, as added Nov. 30, 1940, ch. 926, 54 Stat. 1221).

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phraseology.

§ 2157. Temporary extension of sections 2153 and 2154

(a) The provisions of sections 2153 and 2154 of this title, as amended and extended by section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under any of these provisions when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

(b) Effective in each case for the period above provided for, title 18, United States Code, section 2151, is amended by inserting the words "or defense activities" immediately before the period at the end of the definition of "war material", and said sections 2153 and 2154 are amended by inserting the words "or defense activities" immediately after the words "carrying on the war" wherever they appear therein.

(Added June 30, 1953, c. 175, § 2, 67 Stat. 133.)

References in Text. Section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), referred to in subsec. (a), was repealed.

Proc. 2912, 3 C.F.R., 1950 Supp., p. 71, referred to in subsec. (a), probably means Proc. 2914.

CHAPTER 107—SEAMEN AND STOWAWAYS

Sec.
2191. Cruelty to seamen.
2192. Incitation of seamen to revolt or mutiny.
2193. Revolt or mutiny of seamen.
2194. Shanghaiing sailors.
2195. Abandonment of sailors.
2196. Drunkenness or neglect of duty by seamen.
2197. Misuse of Federal certificate, license or document.
2198. Seduction of female passenger.
2199. Stowaways on vessels or aircraft.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2191. Cruelty to seamen

Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, flogs, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any corporal or other cruel and unusual punishment, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 482 and section 712 of title 46, U.S.C., 1940 ed., Shipping (Dec. 21, 1898, ch. 28, § 22, 30 Stat. 761; Mar. 4, 1909, ch. 321, § 291, 35 Stat. 1145).

Section consolidates section 482 of title 18, U.S.C., 1940 ed., and the following language from section 712 of title 46, U.S.C., 1940 ed., Shipping, prohibiting flogging and corporal punishment: "and any master or other officer thereof who shall violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, punishable by imprisonment for not less than three months nor more than two years." That language was the basis for the addition of the word "flogs" and the words "any corporal or other" for the word "any." The punishment imposed by section 482 was adopted as that was the later statute as incorporated in 1909 Criminal Code.

Words "shall be deemed guilty of a misdemeanor," contained in said section 712 of title 46, were omitted in view of definitive section 1 of this title.

Minor changes were made in phraseology.

§ 2192. Incitation of seamen to revolt or mutiny

Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect his proper duty on board thereof, or to betray his proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof, shall be fined

not more than $1,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 483 (Mar. 4, 1909, ch. 321, § 292, 35 Stat. 1146).

Minor changes were made in phraseology.

§ 2193. Revolt or mutiny of seamen

Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and mutiny, and shall be fined not more than $2,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 484 (Mar. 4, 1909, ch. 321, § 293, 35 Stat. 1146).

Punishment provision for mandatory fine and imprisonment was rephrased in the alternative so as to vest power in the court to impose either a fine, or imprisonment, or both, in its discretion.

§ 2194. Shanghaiing sailors

Whoever, with intent that any person shall perform service or labor of any kind on board of any vessel engaged in trade and commerce among the several States or with foreign nations, or on board of any vessel of the United States engaged in navigating the high seas or any navigable water of the United States, procures or induces, or attempts to procure or induce, another, by force or threats or by representations which he knows or believes to be untrue, or while the person so procured or induced is intoxicated or under the influence of any drug, to go on board of any such vessel, or to sign or in anywise enter into any agreement to go on board of any such vessel to perform service or labor thereon; or

Whoever knowingly detains on board of any such vessel any person so procured or induced to go on board, or to enter into any agreement to go on board, by any means herein defined—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 144 (Mar. 4, 1909, ch. 321, § 82, 35 Stat. 1103).

Reference to persons aiding or abetting was omitted as unnecessary as such persons are made principals by section 2 of this title.

Minor changes were made in phraseology and arrangement.

§ 2195. Abandonment of sailors

Whoever, being master or commander of a vessel of the United States, while abroad, maliciously and without justifiable cause forces any officer or mariner of such vessel on shore, in order to leave him behind in any foreign port or place, or refuses to bring home again all such officers and mariners of such vessel whom he carried out with him, as are in a condition to return and willing to return, when he is ready to proceed on his homeward voyage, shall be fined not more than $500 or imprisoned not more than six months, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 486 (Mar. 4, 1909, ch. 321, § 295, 35 Stat. 1146).

§ 2196. Drunkenness or neglect of duty by seamen

Whoever, being a master, officer, radio operator, seaman, apprentice or other person employed on any merchant vessel, by willful breach of duty, or by reason of drunkenness, does any act tending to the immediate loss or destruction of, or serious damage to, such vessel, or tending immediately to endanger the life or limb of any person belonging to or on board of such vessel; or, by willful breach of duty or by neglect of duty or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such vessel from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall be imprisoned not more than one year.

HISTORICAL AND REVISION NOTES

Based on section 704 of title 46, U.S.C., 1940 ed., Shipping (R.S. § 4602).

Words "officer, radio operator," and "or other person employed on" were inserted at beginning of section to insure clarity and scope of section. Section 701 of title 46, U.S.C., 1940 ed., Shipping, is very similar to this section as revised, and has been applied to mates [*Morris* v. *Cornell*, D.C.Mass. 1843, Fed.Cas. No. 9,829; *Gladding* v. *Constant*, D.C.Mass. 1844, Fed.Cas. No. 5,468; *Foye* v. *Dabney*, D.C.Mass. 1853, Fed.Cas. No. 5,022; *Foye* v. *Lickie*, D.C.Mass. 1853, Fed.Cas. No. 5,023; *The Sylvia De Grasse*, D.C.N.Y. 1843, Fed.Cas. No. 12,676; *The Sadie C. Sumner*, D.C.Mass. 1905, 142 F. 611], as

well as engineers, assistant engineers and cooks. (See notes of decisions under section 701, of title 46, U.S.C., Shipping.)

Words "be guilty of a misdemeanor" were omitted as unnecessary in view of general definition of "misdemeanor" in section 1 of this title.

Minor changes were made in phraseology including substitution of "one year" for "twelve months" at end of section.

§ 2197. Misuse of Federal certificate, license or document

Whoever, not being lawfully entitled thereto, uses, exhibits, or attempts to use or exhibit, or, with intent unlawfully to use the same, receives or possesses any certificate, license, or document issued to vessels, or officers or seamen by any officer or employee of the United States authorized by law to issue the same; or

Whoever, without authority, alters or attempts to alter any such certificate, license, or document by addition, interpolation, deletion, or erasure; or

Whoever forges, counterfeits, or steals, or attempts to forge, counterfeit, or steal, any such certificate, license, or document; or unlawfully possesses or knowingly uses any such altered, changed, forged, counterfeit, or stolen certificate, license, or document; or

Whoever, without authority, prints or manufactures any blank form of such certificate, license, or document, or

Whoever possesses without lawful excuse, and with intent unlawfully to use the same, any blank form of such certificate, license, or document; or

Whoever, in any manner, transfers or negotiates such transfer of, any blank form of such certificate, license, or document, or any such altered, forged, counterfeit, or stolen certificate, license, or document, or any such certificate, license, or document to which the party transferring or receiving the same is not lawfully entitled—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Historical and Revision Notes

Based on section 710a of title 46, U.S.C., 1940 ed., Shipping (June 25, 1936, ch. 816, § 6, 49 Stat. 1936).

The phrase "the Bureau of Marine Inspection and Navigation," identifying the agency issuing the certificate, license or document, was omitted without change of substance. The functions of the Bureau of Marine Inspection and Navigation were transferred to the Bureau of Customs and the Coast Guard by Executive Order 9083 Feb. 28, 1942, title 50, App. U.S.C., 1940 ed., following § 601. Such transfer is temporary under section 621 of title 50, App., U.S.C., 1940 ed. (First War Powers Act).

As revised the section is broad enough to embrace certificates, licenses and documents issued by the officers or employees of the Coast Guard and Customs Service, as the case may be.

Reference to persons causing, procuring, aiding or abetting was omitted as such persons are principals under section 2 of this title.

Words "upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

Changes were made in phraseology and arrangement.

§ 2198. Seduction of female passenger

Whoever, being a master, officer, seaman, or other person employed on board of any American vessel, during the voyage, under promise of marriage, or by threats, or the exercise of authority, or solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Subsequent intermarriage of the parties may be pleaded in bar of conviction and no conviction shall be had on the testimony of the female seduced without other evidence.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 459, 460 (Mar. 4, 1909, ch. 321, §§ 280, 281, 35 Stat. 1143, 1144).

Section 459 of title 18, U.S.C., 1940 ed., and a part of section 460 of title 18, U.S.C., 1940 ed., were combined to form this section.

Provision in section 460 of title 18, U.S.C., 1940 ed., relating to disposal of the fine, was incorporated in section 3614 of this title; the provision limiting prosecutions was incorporated in section 3286 of this title; and the remainder retained in this section.

Minor changes were made in phraseology.

§ 2199. Stowaways on vessels or aircraft

Whoever, without the consent of the owner, charterer, master, or person in command of any vessel, or aircraft, with intent to obtain transportation, boards, enters or secretes himself aboard such vessel or aircraft and is thereon at the time of departure of said vessel or aircraft from a port, harbor, wharf, airport or other place within the jurisdiction of the United States; or

Whoever, with like intent, having boarded, entered or secreted himself aboard a vessel or aircraft at any place within or without the jurisdiction of the United States, remains aboard after the vessel or aircraft has left such place and is thereon at any place within the jurisdiction of the United States; or

Whoever, with intent to obtain a ride or transportation, boards or enters any aircraft owned or operated by the United States without the consent

of the person in command or other duly authorized officer or agent—

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "aircraft" as used in this section includes any contrivance for navigation or flight in the air.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C, 1940 ed., §§ 469–474 (June 11, 1940, ch. 326, §§ 1–3, 54 Stat. 306; Mar. 4, 1944, ch. 82, §§ 1–4, 58 Stat. 111; Apr. 10, 1944, ch. 162, 58 Stat. 188).

Sections consolidated and rewritten with changes of phraseology and substance.

In section 469 of title 18, U.S.C., 1940 ed., the element of intent not to pay for transportation was omitted as unnecessary since the payment of transportation will invariably remove the stowaway from the operation of the section by purchasing the master's "consent".

In section 472 of title 18, U.S.C, 1940 ed., the enumerations of State, Territory, Possession, District of Columbia, and The Canal Zone, was omitted as adequately covered by "place within the jurisdiction of the United States."

The punishment provision is the same in sections 470, 472, and 473 of title 18, U.S.C., 1940 ed., but the fine is $500 more than the maximum fine provided by said section 469. There seemed no point, however, in preserving a differential in favor of the stowaway as against the aider and abettor of $500. The court can be trusted to exercise a wise discretion within the slightly larger limits provided by the revised section.

The provision for punishment of aiders and abettors in section 470 of title 18, U.S.C, 1940 ed., was omitted as unnecessary since they are punishable as principals by section 2 of this title.

Sections 471 and 474 of title 18, U.S.C., 1940 ed., were omitted as obviously unnecessary.

CHAPTER 109—SEARCHES AND SEIZURES

Sec.
2231. Assault or resistance.
2232. Destruction or removal of property to prevent seizure.
2233. Rescue of seized property.
2234. Authority exceeded in executing warrant.
2235. Search warrant procured maliciously.
2236. Searches without warrant.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2231. Assault or resistance

(a) Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both; and—

(b) Whoever, in committing any act in violation of this section, uses any deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 121, 253, 254, 628 (Mar. 4, 1909, ch. 321, § 65, 35 Stat. 1100; June 15, 1917, ch. 30, title XI, § 18, 40 Stat. 230; May 18, 1934, ch. 299, §§ 1, 2, 48 Stat. 780, 781; Feb. 8, 1936, ch. 40, 49 Stat. 1105; June 26, 1936, ch. 830, title I, § 3, 49 Stat. 1940; Reorg. Plan No. II, § 4(f), eff. July 1, 1939, 4 Fed.Reg. 2731, 53 Stat. 1433; June 13, 1940, ch. 359, 54 Stat. 391).

Section consolidates section 628 of title 18, U.S.C., 1940 ed., and the portion of section 121 of said title relating to resistance of persons authorized to make searches.

Punishment provided by section 121 of title 18, U.S.C., 1940 ed., was $2,000 fine and imprisonment for 1 year. Section 628 of said title was part of Espionage Act of June 15, 1917, ch. 30, title XIII, § 1, 40 Stat. 231, prescribing fine of not more than $1,000 and imprisonment not exceeding 2 years for resisting service, execution of search warrant, or assaulting an officer.

Section 253 of title 18, U.S.C., 1940 ed., enumerated United States marshals, deputies, and assistants, Federal Bureau of Investigation agents, and numerous other officers, the killing of whom is denounced as a Federal offense.

Section 254 of title 18, U.S.C., 1940 ed., denounced the assaulting of such officers and prescribed punishment therefor without regard to nature of duties involved or performed.

In other words sections 253 and 254 of title 18, U.S.C., 1940 ed., were not limited to officers executing search warrants.

Officers enumerated in section 253 of title 18, U.S.C., 1940 ed., were substantially all those who serve or execute search warrants. Therefore, the language and punishment under section 254 of said title constitute basis of this revised section. No change in legislative intent is involved, as the amendments of sections 253 and 254 of said title are the latest enactments.

The provisions of section 121 of title 18, U.S.C., 1940 ed., relating to rescue of property from seizing officer or its destruction to prevent seizure, are incorporated in sections 2232 and 2233 of this title.

Minor changes were made in translation and phraseology.

§ 2232. Destruction or removal of property to prevent seizure

Whoever, before, during, or after seizure of any property by any person authorized to make searches and seizures, in order to prevent the seizure or securing of any goods, wares, or merchandise by such person, staves, breaks, throws over-

board, destroys, or removes the same, shall be fined not more than $10,000 or imprisoned more than five years, or both.

Whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 1103, 98 Stat. 2143.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 121 (Mar. 4, 1909, ch. 321, § 65, 35 Stat. 1100).

Section was formed from the words following the first semicolon and ending with the second semicolon, in section 121 of title 18, U.S.C., 1940 ed.

The remaining provisions of section 121 of title 18, U.S.C., 1940 ed., relating to assaulting, resisting, or interfering with customs officers, revenue officers, or other persons, and to the rescue of seized property, constitute, along with provisions from other sections, sections 2231 and 2233 of this title.

Minor changes were made in phraseology.

§ 2233. Rescue of seized property

Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained, or seized by any officer or other person under the authority of any revenue law of the United States, or by any person authorized to make searches and seizures, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 121, 128 (Mar. 4, 1909, ch. 321, §§ 65, 71, 35 Stat. 1100, 1101).

Section consolidates that portion of section 121 of title 18, U.S.C., 1940 ed., relating to rescue of seized property, with section 128 of title 18, U.S.C., 1940 ed.

The remaining provisions of section 121 of present title 18, U.S.C., 1940 ed., relating to assaulting, resisting, or interfering with customs officers, revenue officers, or other persons, and to the destruction or removal of property to prevent seizure, constitute sections 2231 and 2232 of this title, the former provisions being consolidated with certain provisions of other sections.

Said section 121 of present title 18, U.S.C., 1940 ed., provided for punishment by fine of not more than $2,000 or imprisonment of not more than 1 year, or both, of persons rescuing, attempting to rescue, or causing to be rescued, "any property" which has been seized by "any person" authorized to make searches and seizures.

Said section 128 of present title 18, U.S.C., 1940 ed., provided for punishment by fine of not more than $300 and imprisonment for not more than 1 year of persons dispossessing, rescuing, or attempting to dispossess or rescue, or aiding or assisting in dispossessing or rescuing, "any property taken or detained by any officer or other person under the authority of any revenue law of the United States."

This revised section adopts the maximum fine provisions of section 121 of title 18, U.S.C., 1940 ed., and extends the maximum term of imprisonment to 2 years. This was deemed advisable so that uniformity of punishment would be established and the provisions would be sufficiently broad to impose punishment commensurate with the gravity of the offense. (See section 3601(c)(2) of title 26, U.S.C., 1940 ed., Internal Revenue Code.)

Reference to persons causing, procuring, aiding or assisting was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes were made in phraseology.

§ 2234. Authority exceeded in executing warrant

Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 631 (June 15, 1917, ch. 30, title XI, § 21, 40 Stat. 230).

Minor changes were made in phraseology.

§ 2235. Search warrant procured maliciously

Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined not more than $1,000 or imprisoned not more than one year.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 630 (June 15, 1917, ch. 30, title XI, § 20, 40 Stat. 230).

Minor changes were made in phraseology.

§ 2236. Searches without warrant

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant, shall be fined for a first offense not more than $1,000; and, for a subsequent offense, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not apply to any person—

(a) serving a warrant of arrest; or

(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 53a (Aug. 27, 1935, ch. 740, § 201, 49 Stat. 877).

Words "or any department or agency thereof" were inserted to avoid ambiguity as to scope of section. (See definitive section 6 of this title.)

The exception in the case of an invitation or the consent of the occupant, was inserted to make the section complete and remove any doubt as to the application of this section to searches which have uniformly been upheld.

Reference to misdemeanor was omitted in view of definitive section 1 of this title. (See reviser's note under section 212 of this title.)

Words "upon conviction thereof shall be" were omitted as surplusage, since punishment cannot be imposed until conviction is secured.

Minor changes were made in phraseology.

CHAPTER 110—SEXUAL EXPLOITATION OF CHILDREN

Sec.
2251. Sexual exploitation of children.
2252. Certain activities relating to material involving the sexual exploitation of minors.
2253. Criminal forfeiture.
2254. Civil forfeiture.
2255. Definitions for chapter.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

(Added Pub.L. 95–225, § 2(a), Feb. 6, 1978, 92 Stat. 7, and amended Pub.L. 98–292, § 3, May 21, 1984, 98 Stat. 204.)

Short Title of 1984 Amendment. Section 1 of Pub.L. 98–292, May 21, 1984, 98 Stat. 204, provided that "this Act [Pub.L. 98–292] may be cited as the 'Child Protection Act of 1984'."

Congressional Findings. Section 2 of Pub.L. 98–292, May 21, 1984, 98 Stat. 204, provided that:

"The Congress finds that—

"(1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale;

"(2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and

"(3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society."

Annual Report to Congress. Attorney General to report annually to Congress on prosecutions, convictions, and forfeitures under this chapter, see section 9 of Pub.L. 98–292, May 21, 1984, 98 Stat. 206, set out as a note under section 522 of Title 28, Judiciary and Judicial Procedure.

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or

mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

(Added Pub.L. 95–225, § 2(a), Feb. 6, 1978, 92 Stat. 7, and amended Pub.L. 98–292, § 4, May 21, 1984, 98 Stat. 204.)

§ 2253. Criminal forfeiture

(a) A person who is convicted of an offense under section 2251 or 2252 of this title shall forfeit to the United States such person's interest in—

(1) any property constituting or derived from gross profits or other proceeds obtained from such offense; and

(2) any property used, or intended to be used, to commit such offense.

(b) In any action under this section, the court may enter such restraining orders or take other appropriate action (including acceptance of performance bonds) in connection with any interest that is subject to forfeiture.

(c) The court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, beyond a reasonable doubt, that such property is subject to forfeiture.

(d)(1) Except as provided in paragraph (3) of this subsection, the customs laws relating to disposition of seized or forfeited property shall apply to property under this section, if such laws are not inconsistent with this section.

(2) In any disposition of property under this section, a convicted person shall not be permitted to acquire property forfeited by such person.

(3) The duties of the Secretary of the Treasury with respect to dispositions of property shall be performed under paragraph (1) of this subsection by the Attorney General, unless such duties arise from forfeitures effected under the customs laws.

(Added Pub.L. 98–292, § 6, May 21, 1984, 98 Stat. 205.)

References in Text. The customs laws, referred to in subsec. (d)(1) and (3), are classified, generally, to Title 19, Customs Duties.

§ 2254. Civil forfeiture

(a) The following property shall be subject to forfeiture by the United States:

(1) Any material or equipment used, or intended for use, in producing, reproducing, transporting, shipping, or receiving any visual depiction in violation of this chapter.

(2) Any visual depiction produced, transported, shipped, or received in violation of this chapter, or any material containing such depiction.

(3) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(Added Pub.L. 98–292, § 6, May 21, 1984, 98 Stat. 205.)

References in Text. The customs laws, referred to in subsec. (b), are classified, generally, to Title 19, Customs Duties.

§ 2255. Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising; and

(4) "organization" means a person other than an individual.

(Added Pub.L. 95–225, § 2(a), Feb. 6, 1978, 92 Stat. 8, § 2253, redesignated and amended Pub.L. 98–292, § 5, May 21, 1984, 98 Stat. 205.)

CHAPTER 111—SHIPPING

Sec.
2271. Conspiracy to destroy vessel.[1]
2272. Destruction of vessel by owner.
2273. Destruction of vessel by nonowner.
2274. Destruction or misuse of vessel by person in charge.
2275. Firing or tampering with vessel.[1]
2276. Breaking and entering vessel.
2277. Explosives or dangerous weapons aboard vessels.
2278. Explosives on vessels carrying steerage passengers.
2279. Boarding vessels before arrival.

[1] So in original. Catchline reads "vessels".

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2271. Conspiracy to destroy vessels

Whoever, on the high seas, or within the United States, willfully and corruptly conspires, combines, and confederates with any other person, such other person being either within or without the United States, to cast away or otherwise destroy any vessel, with intent to injure any person that may have underwritten or may thereafter underwrite any policy of insurance thereon or on goods on board thereof, or with intent to injure any person that has lent or advanced, or may lend or advance, any money on such vessel on bottomry or respondentia; or

Whoever, within the United States, builds, or fits out any vessel to be cast away or destroyed, with like intent—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Historical and Revision Notes

Based on title 18, U.S.C. 1940 ed., § 487 (Mar. 4, 1909, ch. 321, § 296, 35 Stat. 1146).

Mandatory punishment provision was rephrased in the alternative.

Reference to a person who "aids in building or fitting out any vessel" was omitted as unnecessary in view of section 2 making all aiders guilty as principal.

Changes in phraseology were made.

§ 2272. Destruction of vessel by owner

Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, willfully and corruptly casts away or otherwise destroys any vessel of which he is owner, in whole or in part, with intent to injure any person that may underwrite any policy of insurance thereon, or any merchant that may have goods thereon, or any other owner of such vessel, shall be imprisoned for life or for any term of years.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 491 (Mar. 4, 1909, ch. 321, § 300, 35 Stat. 1147).

§ 2273. Destruction of vessel by nonowner

Whoever, not being an owner, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, willfully and corruptly casts away or otherwise destroys any vessel of the United States to which he belongs, or willfully attempts the destruction thereof, shall be imprisoned not more than ten years.

Historical and Revision Notes

Based on title 18, U.S.C., 940 ed., § 492 (Mar. 4, 1909, ch. 321, § 301, 35 Stat. 1147).

Words "with intent to destroy the same, sets fire to any such vessel, or otherwise" following "willfully" and preceding "attempts" were omitted as surplusage.

§ 2274. Destruction or misuse of vessel by person in charge

Whoever, being the owner, master or person in charge or command of any private vessel, foreign or domestic, or a member of the crew or other person, within the territorial waters of the United States, willfully causes or permits the destruction or injury of such vessel or knowingly permits said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or any offense in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States; or knowingly permits such vessels to be used in violation of the rights and obligations of the United States under the law of nations, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

In case such vessels are so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws.

HISTORICAL AND REVISION NOTES

Based on section 193 of title 50, U.S.C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title II, § 3, 40 Stat. 220; Mar. 28, 1940, ch. 72, § 3(b), 54 Stat. 79).

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 2275. Firing or tampering with vessels

Whoever sets fire to any vessel of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations, or to any vessel of the United States, or to the cargo of the same, or tampers with the motive power or instrumentalities of navigation of such vessel, or places bombs or explosives in or upon such vessel, or does any other act to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, with intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board, whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom and whoever attempts to do so shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 502 (June 15, 1917, ch. 30, title III, § 1, 40 Stat. 221).

Words "as defined in section 501 of this title," were omitted in view of section 9 of this title, defining vessel of the United States.

Last sentence of said section 502, defining "United States", was incorporated in section 5 of this title.

Provision prohibiting conspiracy was deleted as adequately covered by the general conspiracy statute, section 371 of this title.

Minor changes were made in phraseology.

§ 2276. Breaking and entering vessel

Whoever, upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, breaks or enters any vessel with intent to commit any felony, or maliciously cuts, spoils, or destroys any cordage, cable, buoys, buoy rope, head fast, or other fast, fixed to the anchor or moorings belonging to any vessel, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 490 (Mar. 4, 1909, ch. 321, § 299, 35 Stat. 1147).

Mandatory punishment provision was rephrased in the alternative.

§ 2277. Explosives or dangerous weapons aboard vessels

(a) Whoever brings, carries, or possesses any dangerous weapon, instrument, or device, or any dynamite, nitroglycerin, or other explosive article or compound on board of any vessel registered, enrolled, or licensed under the laws of the United States, or any vessel purchased, requisitioned, chartered, or taken over by the United States pursuant to the provisions of Act June 6, 1941, ch. 174, 55 Stat. 242, as amended, without previously obtaining the permission of the owner or the master of such vessel; or

Whoever brings, carries, or possesses any such weapon or explosive on board of any vessel in the possession and under the control of the United States or which has been seized and forfeited by the United States or upon which a guard has been placed by the United States pursuant to the provisions of section 191 of Title 50, without previously obtaining the permission of the captain of the port in which such vessel is located, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) This section shall not apply to the personnel of the Armed Forces of the United States or to officers or employees of the United States or of a State or of a political subdivision thereof, while acting in the performance of their duties, who are authorized by law or by rules or regulations to own or possess any such weapon or explosive.

References in Text. Act June 6, 1941, ch. 174, 55 Stat. 242, as amended, referred to in subsec. (a), expired July 1, 1953. See now sections 196 to 198 of Title 50, U.S.C.A., War and National Defense.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 503, 504 (Dec. 31, 1941, ch. 642, §§ 1, 2, 55 Stat. 876).

Section consolidates sections 503 and 504 of title 18, U.S.C., 1940 ed.

Words "This section" were substituted in subsection (b) for the words "The provisions of sections 503, 504 of this title".

Minor changes were made in phraseology.

§ 2278. Explosives on vessels carrying steerage passengers

Whoever, being the master of a steamship or other vessel referred to in section 151 of Title 46, except as otherwise expressly provided by law, takes, carries, or has on board of any such vessel any nitroglycerin, dynamite, or any other explosive article or compound, or any vitriol or like acids, or gunpowder, except for the ship's use, or any article or number of articles, whether as a cargo or ballast, which, by reason of the nature or quantity or mode of storage thereof, shall, either singly or collectively, be likely to endanger the health or lives of the passengers or the safety of the vessel, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Historical and Revision Notes

Based on section 171 of title 46, U.S.C., 1940 ed., Shipping (Aug. 2, 1882, ch. 374, § 8, 22 Stat. 189).

Words "except as otherwise expressly provided by law" were inserted to remove obvious inconsistency between sections 831–835 of this title, section 170 of title 46, U.S.C., 1940 ed., Shipping, and this section.

Words "shall be deemed guilty of a misdemeanor and" were omitted because designation of the offense as a misdemeanor is unnecessary in view of definitive section 1 of this title.

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

References in text. Section 151 of Title 46, referred to in text, was repealed by Pub.L. 98–89, § 4(b), Aug. 26, 1983, 97 Stat. 600.

§ 2279. Boarding vessels before arrival

Whoever, not being in the United States service, and not being duly authorized by law for the purpose, goes on board any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, shall be fined not more than $200 or imprisoned not more than six months, or both.

The master of such vessel may take any such person into custody, and deliver him up forthwith to any law enforcement officer, to be by him taken before any committing magistrate, to be dealt with according to law.

Historical and Revision Notes

Based on section 708 of title 46, U.S.C., 1940 ed., Shipping (R.S. § 4606).

"Law enforcement officer" was substituted for "constable or police officer" and "committing magistrate" for "justice of the peace." The phraseology used in the statute was archaic. It originated when the government had a few law enforcement officers and magistrates of its own.

References to specific sections were made to read: "according to law" to achieve brevity.

Mandatory punishment provision was rephrased in the alternative.

The words "without permission of the master" were deleted to remove an inconsistency with the provisions of section 163 of title 46, U.S.C., 1940 ed., and customs regulations. Customs regulations, 1943, section 4.1c, prohibit any person "with or without consent of the master" from boarding vessel, with specific enumerated exceptions. Said section 163 prescribes a "penalty of not more than $100 or imprisonment not to exceed six months, or both" for violating regulations. The revised section increases the fine from $100 to $200 for boarding the vessel "with the consent of the master."

Minor changes were made in phraseology.

CHAPTER 113—STOLEN PROPERTY

Sec.
2311. Definitions.
2312. Transportation of stolen vehicles.
2313. Sale or receipt of stolen vehicles.
2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.
2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps.
2316. Transportation of livestock.
2317. Sale or receipt of livestock.
2318. Trafficking in counterfeit labels for phonorecords and copies of motion pictures or other audiovisual works.
2319. Criminal infringement of a copyright.
2320. Trafficking in counterfeit goods or services.
2320.[1] Trafficking in certain motor vehicles or motor vehicle parts.

[1] So in original. Two sections 2320 have been enacted.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2311. Definitions

As used in this chapter:

"Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or for flight in the air;

"Cattle" means one or more bulls, steers, oxen, cows, heifers, or calves, or the carcass or carcasses thereof;

"Money" means the legal tender of the United States or of any foreign country, or any counterfeit thereof;

"Motor vehicle" includes an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle designed for running on land but not on rails;

"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; valid or blank motor vehicle title; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing;

"Tax stamp" includes any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a State, or evidence of the discharge thereof;

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

(As amended Oct. 4, 1961, Pub.L. 87–371, § 1, 75 Stat. 802; Oct. 25, 1984, Pub.L. 98–547, Title II, § 202, 98 Stat. 2770.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 408, 414(b), (c), 417, 419a(a) (Oct. 29, 1919, ch. 89, § 2(a), 41 Stat. 324; May 22, 1934, ch. 333, §§ 2(b), (c), 5, 48 Stat. 794, 795; Aug. 3, 1939, ch. 413, § 3, 53 Stat. 1178; Aug. 18, 1941, ch. 366, § 2(a), 55 Stat. 631; Sept. 24, 1945, ch. 383, § 1, 59 Stat. 536).

The definitive provisions in each of said sections were separated therefrom and consolidated into this one section defining terms used in this chapter.

The definitions of "interstate or foreign commerce", contained in said section 408 and in sections 414(a) and 419a(b) of title 18, U.S.C., 1940 ed., are incorporated in section 10 of this title.

Other provisions of section 408 of title 18, U.S.C., 1940 ed., are incorporated in sections 2312 and 2313 of this title.

In the definition of "motor vehicle", words "designed for running on land but not on rails" were substituted for "not designed for running on rails" so as to conform with the ruling in the case of *McBoyle* v. *U.S.* (1931, 51 S.Ct. 340, 283 U.S. 25, 75 L.Ed. 816), in which the Supreme Court held that "vehicle" is limited to vehicles running on land and that motor vehicle does not include an airplane.

In the paragraph defining "value" which came from said section 417 of title 18, U.S.C., 1940 ed., words "In the event that a defendant is charged in the same indictment with two or more violations of sections 413–419 of this title, then" were omitted and the same meaning was preserved by the substitution of the words "a single" for the word "such."

Minor changes were made in phraseology.

Short Title of 1984 Amendment. Section 1501 of Pub.L. 98–473, Title II, c. XV, Oct. 12, 1984, 98 Stat. 2178, provided: "This chapter [chapter XV of Title II of Pub.L. 98–473] may be cited as the 'Trademark Counterfeiting Act of 1984'."

§ 2312. Transportation of stolen vehicles

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., 408 (Oct. 29, 1919, ch. 89, §§ 1, 3, 5, 41 Stat. 324, 325; Sept. 24, 1945, ch. 383, §§ 2, 3, 59 Stat. 536).

The first sentence of said section 408, providing the short title "An Act to punish the transportation of stolen motor vehicles or aircraft in interstate or foreign commerce," and derived from section 1 of said act of October 29, 1919, as amended, was omitted as not appropriate in a revision.

Definitions of "aircraft," "motor vehicle," and "interstate or foreign commerce," which constituted the second sentence of said section 408 of title 18, U.S.C., 1940 ed., and were derived from section 2 of said act of October 29, 1919, as amended, are incorporated in sections 10 and 2311 of this title.

Provision relating to receiving or selling stolen aircraft or motor vehicles, which was derived from section 4 of the act of October 29, 1919, as amended, is incorporated in section 2313 of this title.

Venue provision, which was derived from section 5 of the act of October 29, 1919, was omitted as unnecessary, being covered by section 3237 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes were made in phraseology.

§ 2313. Sale or receipt of stolen vehicles

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Oct. 25, 1984, Pub.L. 98–547, Title II, § 203, 98 Stat. 2770.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 408 (Oct. 29, 1919, ch. 89, § 4, 41 Stat. 325; Sept. 24, 1945, ch. 383, §§ 2, 3, 59 Stat. 536).

Section constitutes the fourth sentence of said section 408 of title 18, U.S.C., 1940 ed.

Definitions of "aircraft," "motor vehicle," and "interstate or foreign commerce," which constituted the second sentence of said section 408, are incorporated in sections 10 and 2311 of this title.

The third sentence of said section 408, relating to transporting stolen aircraft or motor vehicles, is incorporated in section 2312 of this title.

The first sentence of said section 408, providing the short title, and the fifth sentence thereof, relating to venue, were omitted. (See reviser's note under section 2312 of this title.)

Minor changes were made in phraseology.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

(As amended May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub.L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub.L. 90-535, 82 Stat. 885.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 413, 415, 418, 418a, 419 (May 22, 1934, ch. 333, §§ 1, 3, 6, 48 Stat. 794, 795; May 22, 1934, ch. 333, § 7, as added Aug. 3, 1939, ch. 413, § 5, 53 Stat. 1179; May 22, 1934, ch. 333, § 7, renumbered § 8 by Aug. 3, 1939, ch. 413, § 6, 53 Stat. 1179; Aug. 3, 1939, ch. 413, §§ 1, 4, 5, 53 Stat. 1178, 1179).

Section consolidates sections 413, 415, 417, 418, 418a, and 419 of title 18, U.S.C., 1940 ed.

Words "or with intent to steal or purloin, knowing the same to have been so stolen, converted, or taken" were omitted as surplusage, since property so "taken" is "stolen," and insertion of word "knowingly" after "Whoever" at beginning of section renders such omission possible.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Section 413 of title 18, U.S.C., 1940 ed., providing the short title "National Stolen Property Act," was omitted as not appropriate in a revision.

Section 414 of title 18, U.S.C., 1940 ed., containing definitions of "interstate or foreign commerce," "securities," and "money," is incorporated in sections 10 and 2311 of this title.

Section 417 of title 18, U.S.C., 1940 ed., relating to indictments and determination of "value" of goods, wares, merchandise, securities, and money referred to in indictments, is also incorporated in section 2311 of this title.

Section 418 of title 18, U.S.C., 1940 ed., relating to venue, was omitted as completely covered by section 3237 of this title.

Section 418a of title 18, U.S.C., 1940 ed., relating to conspiracy, was omitted as covered by section 371 of this title, the general conspiracy section.

Section 419 of title 18, U.S.C., 1940 ed., providing that nothing contained in the National Stolen Property Act should be construed to repeal, modify, or amend any part of the National Motor Vehicle Theft Act, was omitted as unnecessary, in view of this revision and reenactment of the provisions of the latter act (sections 10, 2311-2313 of this title).

Changes were made in phraseology and arrangement.

1949 ACT

This amendment [see section 45] restates and clarifies the first paragraph of section 2314 of title 18, U.S.C., to conform to the original law upon which the section is based.

§ 2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

(As amended Oct. 4, 1961, Pub.L. 87-371, § 3, 75 Stat. 802.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 416 (May 22, 1934, ch. 333, § 4, 48 Stat. 795; Aug. 3, 1939, ch. 413, § 2, 53 Stat. 1178).

(See reviser's notes under sections 10, 2311 and 2314 of this title for explanation of consolidation or omission of other sections of title 18, U.S.C. 1940 ed., which were derived from the National Stolen Property Act.)

Minor changes were made in phraseology.

§ 2316. Transportation of livestock

Whoever transports in interstate or foreign commerce any livestock, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 1113, 98 Stat. 2149.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 419b, 419d (Aug. 18, 1941, ch. 366, §§ 3, 5, 55 Stat. 631).

This section consolidates sections 419b and 419d of title 18, U.S.C., 1940 ed.

Definition of "cattle", contained in section 419a(a) of title 18, U.S.C., 1940 ed., is incorporated in section 2311 of this title.

Definition of "interstate or foreign commerce", constituting section 419a(b) of title 18, U.S.C., 1940 ed., is incorporated in section 10 of this title.

The venue provision of said section 419d of title 18, U.S.C., 1940 ed., was omitted as completely covered by section 3237 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes were made in phraseology.

§ 2317. Sale or receipt of livestock

Whoever receives, conceals, stores, barters, buys, sells, or disposes of any livestock, moving in or constituting a part of interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 1114, 98 Stat. 2149.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 419c, 419d (Aug. 18, 1941, ch. 366, §§ 4, 5, 55 Stat. 632).

Definitions of "cattle" and "interstate or foreign commerce", contained in section 419a of title 18, U.S.C., 1940 ed., are incorporated in sections 10 and 2311 of this title.

Venue provision of said section 419d of title 18, U.S.C., 1940 ed., was omitted as completely covered by section 3237 of this title.

Minor changes were made in phraseology.

§ 2318. Trafficking in counterfeit labels for phonorecords,[1] and copies of motion pictures or other audiovisual works

(a) Whoever, in any of the circumstances described in subsection (c) of this section, knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or a copy of a motion picture or other audiovisual work, shall be fined not more than $250,000 or imprisoned for not more than five years, or both.

(b) As used in this section—

(1) the term "counterfeit label" means an identifying label or container that appears to be genuine, but is not;

(2) the term "traffic" means to transport, transfer or otherwise dispose of, to another, as consideration for anything of value or to make or obtain control of with intent to so transport, transfer or dispose of; and

(3) the terms "copy", "phonorecord", "motion picture", and "audiovisual work" have, respectively, the meanings given those terms in section 101 (relating to definitions) of title 17.

(c) The circumstances referred to in subsection (a) of this section are—

(1) the offense is committed within the special maritime and territorial jurisdiction of the United States; or within the special aircraft jurisdiction of the United States (as defined in section 101 of the Federal Aviation Act of 1958);

(2) the mail or a facility of interstate or foreign commerce is used or intended to be used in the commission of the offense; or

(3) the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copyrighted motion picture or other audiovisual work, or a phonorecord of a copyrighted sound recording.

(d) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed.

(e) Except to the extent they are inconsistent with the provisions of this title, all provisions of section 509, title 17, United States Code, are applicable to violations of subsection (a).

[1] So in original.

References in Text. Section 101 of the Federal Aviation Act of 1958, referred to in subsec. (c)(1), is classified to section 1301 of Title 49, U.S.C.A., Transportation.

(Added Pub.L. 87–773, § 1, Oct. 9, 1962, 76 Stat. 775, and amended Pub.L. 93–573, Title I, § 103, Dec. 31, 1974, 88 Stat. 1873; Pub.L. 94–553, Title I, § 111, Oct. 19, 1976, 90 Stat. 2600; Pub.L. 97–180, § 2, May 24, 1982, 96 Stat. 91.)

§ 2319. Criminal infringement of a copyright

(a) Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law.

(b) Any person who commits an offense under subsection (a) of this section—

(1) shall be fined not more than $250,000 or imprisoned for not more than five years, or both, if the offense—

(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings;

(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works; or

(C) is a second or subsequent offense under either of subsection (b)(1) or (b)(2) of this section, where a prior offense involved a sound recording, or a motion picture or other audiovisual work;

(2) shall be fined not more than $250,000 or imprisoned for not more than two years, or both, if the offense—

(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings; or

(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works; and

(3) shall be fined not more than $25,000 or imprisoned for not more than one year, or both, in any other case.

(c) As used in this section—

(1) the terms "sound recording", "motion picture", "audiovisual work", "phonorecord", and "copies" have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17; and

(2) the terms "reproduction" and "distribution" refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of section 106 (relating to exclusive rights in copyrighted works), as limited by sections 107 through 118, of title 17.

(Added Pub. L. 97–180, § 3, May 24, 1982, 96 Stat. 92.)

§ 2320.[1] Trafficking in counterfeit goods or services

(a) Whoever intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services shall, if an individual, be fined not more than $250,000 or imprisoned not more

than five years, or both, and, if a person other than an individual, be fined not more than $1,000,000. In the case of an offense by a person under this section that occurs after that person is convicted of another offense under this section, the person convicted, if an individual, shall be fined not more than $1,000,000 or imprisoned not more than fifteen years, or both, and if other than an individual, shall be fined not more than $5,000,000.

(b) Upon a determination by a preponderance of the evidence that any articles in the possession of a defendant in a prosecution under this section bear counterfeit marks, the United States may obtain an order for the destruction of such articles.

(c) All defenses, affirmative defenses, and limitations on remedies that would be applicable in an action under the Lanham Act shall be applicable in a prosecution under this section. In a prosecution under this section, the defendant shall have the burden of proof, by a preponderance of the evidence, of any such affirmative defense.

(d) For the purposes of this section—

(1) the term "counterfeit mark" means—

(A) a spurious mark—

(i) that is used in connection with trafficking in goods or services;

(ii) that is identical with, or substantially indistinguishable from, a mark registered for those goods or services on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered; and

(iii) the use of which is likely to cause confusion, to cause mistake, or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 110 of the Olympic Charter Act;

but such term does not include any mark or designation used in connection with goods or services of which the manufacturer or producer was, at the time of the manufacture or production in question authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation;

(2) the term "traffic" means transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent so to transport, transfer, or dispose of;

(3) the term "Lanham Act" means the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (15 U.S.C. 1051 et seq.); and

(4) the term "Olympic Charter Act" means the Act entitled "An Act to incorporate the United States Olympic Association", approved September 21, 1950 (36 U.S.C. 371 et seq.).

(Added Pub.L. 98–473, Title II, § 1502(a), Oct. 12, 1984, 98 Stat. 2178.)

[1] So in original. Another section 2320 is set out post.

References in Text. The Lanham Act, referred to in subsecs. (c) and (d)(3), is Act July 5, 1946, ch. 540, 60 Stat. 427, which is classified generally to chapter 22 (§ 1051 et seq.) of Title 15, Commerce and Trade.

The Act to incorporate the United States Olympic Association, referred to in subsec. (d)(4), is Act Sept. 21, 1950, chapter 975, 64 Stat. 899, which is classified to chapter 17 (§ 371 et seq.) of Title 36, Patriotic Societies and Observances.

Section 110 of the Olympic Charter Act, referred to in subsec. (d)(1)(B), is section 110 of Act Sept. 21, 1950, chapter 975, as added by Pub.L. 95–606, § 1(b), Nov. 8, 1978, 92 Stat. 3048, which is classified to section 380 of Title 36.

§ 2320.[1] Trafficking in certain motor vehicles or motor vehicle parts

(a) Whoever buys, receives, possesses, or obtains control of, with intent to sell or otherwise dispose of, a motor vehicle or motor vehicle part, knowing that an identification number for such motor vehicle or part has been removed, obliterated, tampered with, or altered, shall be fined not more than $20,000 or imprisoned not more than ten years, or both.

(b) Subsection (a) does not apply if the removal, obliteration, tampering, or alteration—

(1) is caused by collision or fire; or

(2) is not a violation of section 511 of this title.

(c) As used in this section, the terms "identification number" and "motor vehicle" have the meaning given those terms in section 511 of this title.

(Added Pub.L. 98–547, Title II, § 204(a), Oct. 25, 1984, 98 Stat. 2770.)

[1] So in original. Another section 2320 is set out ante.

CHAPTER 114—TRAFFICKING IN CONTRABAND CIGARETTES

Sec.

2341. Definitions.
2342. Unlawful acts.
2343. Recordkeeping and inspection.
2344. Penalties.
2345. Effect on State law.
2346. Enforcement and regulations.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12,

1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2341. Definitions

As used in this chapter—

(1) the term "cigarette" means—

(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and

(B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term "contraband cigarettes" means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than—

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1954 as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person—

(i) who is licensed or otherwise authorized by the State where the cigarettes are found to account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

(3) the term "common or contract carrier" means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under subtitle IV of title 49, or under equivalent operating authority from a regulatory agency of the United States or of any State;

(4) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands; and

(5) the term "Secretary" means the Secretary of the Treasury.

(Added Pub.L. 95–575, § 1, Nov. 2, 1978, 92 Stat. 2463, and amended Pub.L. 97–449, § 5(c), Jan. 12, 1983, 96 Stat. 2442.)

References in Text. Chapter 52 of the Internal Revenue Code of 1954, referred to in par. (2)(A), is classified to section 5701 et seq. of Title 26, U.S.C.A., Internal Revenue Code.

§ 2342. Unlawful acts

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction.

(Added Pub.L. 95–575, § 1, Nov. 2, 1978, 92 Stat. 2464.)

§ 2343. Recordkeeping and inspection

(a) Any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Secretary may prescribe by rule or regulation. The Secretary may require such person to keep only—

(1) the name, address, destination (including street address), vehicle license number, driver's license number, signature of the person receiving such cigarettes, and the name of the purchaser;

(2) a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another); and

(3) a declaration of the name and address of the recipient's principal in all cases when the recipient is acting as an agent.

Such information shall be contained on business records kept in the normal course of business. Nothing contained herein shall authorize the Secretary to require reporting under this section.

(b) Upon the consent of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction, or pursuant to a duly issued search warrant, the Secretary may enter the premises (including places of stor-

age) of such person for the purpose of inspecting any records or information required to be maintained by such person under this chapter, and any cigarettes kept or stored by such person at such premises.

(Added Pub.L. 95–575, § 1, Nov. 2, 1978, 92 Stat. 2464.)

§ 2344. Penalties

(a) Whoever knowingly violates section 2342(a) of this title shall be fined not more than $100,000 or imprisoned not more than five years, or both.

(b) Whoever knowingly violates any rule or regulation promulgated under section 2343(a) or 2346 of this title or violates section 2342(b) of this title shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(c) Any contraband cigarettes involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of such Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(Added Pub.L. 95–575, § 1, Nov. 2, 1978, 92 Stat. 2464.)

§ 2345. Effect on State law

(a) Nothing in this chapter shall be construed to affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws.

(b) Nothing in this chapter shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by a number of States, through interstate compact or otherwise, to provide for the administration of State cigarette tax laws, to provide for the confiscation of cigarettes and other property seized in violation of such laws, and to establish cooperative programs for the administration of such laws.

(Added Pub.L. 95–575, § 1, Nov. 2, 1978, 92 Stat. 2465.)

§ 2346. Enforcement and regulations

The Secretary, subject to the provisions of section 2343(a) of this title, shall enforce the provisions of this chapter and may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.

(Added Pub.L. 95–575, § 1, Nov. 2, 1978, 92 Stat. 2465.)

CHAPTER 115—TREASON, SEDITION, AND SUBVERSIVE ACTIVITIES

Sec.
2381. Treason.
2382. Misprision of treason.
2383. Rebellion or insurrection.
2384. Seditious conspiracy.
2385. Advocating overthrow of Government.
2386. Registration of certain organizations.
2387. Activities affecting armed forces generally.
2388. Activities affecting armed forces during war.
2389. Recruiting for service against United States.
2390. Enlistment to serve against United States.
2391. Temporary extension of section 2388.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2381. Treason

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 1, 2 (Mar. 4, 1909, ch. 321, §§ 1, 2, 35 Stat. 1088).

Section consolidates sections 1 and 2 of title 18, U.S.C., 1940 ed.

The language referring to collection of the fine was omitted as obsolete and repugnant to the more humane policy of modern law which does not impose criminal consequences on the innocent.

The words "every person so convicted of treason" were omitted as redundant.

Minor change was made in phraseology.

§ 2382. Misprision of treason

Whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular State, is guilty of misprision of treason and shall be fined not more than $1,000 or imprisoned not more than seven years, or both.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 3 (Mar. 4, 1909, ch. 321, § 3, 35 Stat. 1088).

Mandatory punishment provision was rephrased in the alternative.

§ 2383. Rebellion or insurrection

Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 4 (Mar. 4, 1909, ch. 321, § 4, 35 Stat. 1088).

Word "moreover" was deleted as surplusage and minor changes were made in phraseology.

§ 2384. Seditious conspiracy

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $20,000 or imprisoned not more than twenty years, or both.

(As amended July 24, 1956, c. 678, § 1, 70 Stat. 623.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 6 (Mar. 4, 1909, ch. 321, § 6, 35 Stat. 1089).

§ 2385. Advocating overthrow of Government

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

As used in this section, the terms "organizes" and "organize", with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons.

(As amended July 24, 1956, c. 678, § 2, 70 Stat. 623; June 19, 1962, Pub.L. 87-486, 76 Stat. 103.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 10, 11, 13 (June 28, 1940, ch. 439, title I, §§ 2, 3, 5, 54 Stat. 670, 671).

Section consolidates sections 10, 11 and 13 of title 18, U.S.C., 1940 ed. Section 13 of title 18, U.S.C., 1940 ed., which contained the punishment provisions applicable to sections 10 and 11 of title 18, U.S.C., 1940 ed., was combined with section 11 of title 18, U.S.C., 1940 ed., and added to this section.

In first paragraph, words "the Government of the United States or the government of any State, Territory, District or possession thereof, or the government of any political subdivision therein" were substituted for "any government in the United States".

In second and third paragraphs, word "such" was inserted after "any" and before "government", and words "in the United States" which followed "government" were omitted.

In view of these changes, the provisions of subsection (b) of section 10 of title 18, U.S.C., 1940 ed., which defined the term "government in the United States" were omitted as unnecessary.

Reference to conspiracy to commit any of the prohibited acts was omitted as covered by the general conspiracy provision, incorporated in section 371 of this title. (See reviser's note under that section.)

Words "upon conviction thereof" which preceded "be fined" were omitted as surplusage, as punishment cannot be imposed until a conviction is secured.

The phraseology was considerably changed to effect consolidation but without any change of substance.

§ 2386. Registration of certain organizations

(A) For the purposes of this section:

"Attorney General" means the Attorney General of the United States;

"Organization" means any group, club, league, society, committee, association, political party, or combination of individuals, whether incorporated or otherwise, but such term shall not include any corporation, association, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes;

"Political activity" means any activity the purpose or aim of which, or one of the purposes or aims of which, is the control by force or overthrow of the Government of the United States or a political subdivision thereof, or any State or political subdivision thereof;

An organization is engaged in "civilian military activity" if:

(1) it gives instruction to, or prescribes instruction for, its members in the use of firearms or other weapons or any substitute therefor, or military or naval science; or

(2) it receives from any other organization or from any individual instruction in military or naval science; or

(3) it engages in any military or naval maneuvers or activities; or

(4) it engages, either with or without arms, in drills or parades of a military or naval character; or

(5) it engages in any other form of organized activity which in the opinion of the Attorney General constitutes preparation for military action;

An organization is "subject to foreign control" if:

(a) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization; or

(b) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization.

(B)(1) The following organizations shall be required to register with the Attorney General:

Every organization subject to foreign control which engages in political activity;

Every organization which engages both in civilian military activity and in political activity;

Every organization subject to foreign control which engages in civilian military activity; and

Every organization, the purpose or aim of which, or one of the purposes or aims of which, is the establishment, control, conduct, seizure, or overthrow of a government or subdivision thereof by the use of force, violence, military measures, or threats of any one or more of the foregoing.

Every such organization shall register by filing with the Attorney General, on such forms and in such detail as the Attorney General may by rules and regulations prescribe, a registration statement containing the information and documents prescribed in subsection (B)(3) and shall within thirty days after the expiration of each period of six months succeeding the filing of such registration statement, file with the Attorney General, on such forms and in such detail as the Attorney General may by rules and regulations prescribe, a supplemental statement containing such information and documents as may be necessary to make the information and documents previously filed under this section accurate and current with respect to such preceding six months' period. Every statement required to be filed by this section shall be subscribed, under oath, by all of the officers of the organization.

(2) This section shall not require registration or the filing of any statement with the Attorney General by:

(a) The armed forces of the United States; or

(b) The organized militia or National Guard of any State, Territory, District, or possession of the United States; or

(c) Any law-enforcement agency of the United States or of any Territory, District or possession thereof, or of any State or political subdivision of a State, or of any agency or instrumentality of one or more States; or

(d) Any duly established diplomatic mission or consular office of a foreign government which is so recognized by the Department of State; or

(e) Any nationally recognized organization of persons who are veterans of the armed forces of the United States, or affiliates of such organizations.

(3) Every registration statement required to be filed by any organization shall contain the following information and documents:

(a) The name and post-office address of the organization in the United States, and the names and addresses of all branches, chapters, and affiliates of such organization;

(b) The name, address, and nationality of each officer, and of each person who performs the functions of an officer, of the organization, and of each branch, chapter, and affiliate of the organization;

(c) The qualifications for membership in the organization;

(d) The existing and proposed aims and purposes of the organization, and all the means by which these aims or purposes are being attained or are to be attained;

(e) The address or addresses of meeting places of the organization, and of each branch, chapter, or affiliate of the organization, and the times of meetings;

(f) The name and address of each person who has contributed any money, dues, property, or other thing of value to the organization or to any branch, chapter, or affiliate of the organization;

(g) A detailed statement of the assets of the organization, and of each branch, chapter, and affiliate of the organization, the manner in which such assets were acquired, and a detailed statement of the liabilities and income of the organization and of each branch, chapter, and affiliate of the organization;

(h) A detailed description of the activities of the organization, and of each chapter, branch, and affiliate of the organization;

(i) A description of the uniforms, badges, insignia, or other means of identification prescribed by the organization, and worn or carried by its officers or members, or any of such officers or members;

(j) A copy of each book, pamphlet, leaflet, or other publication or item of written, printed, or graphic matter issued or distributed directly or indirectly by the organization, or by any chapter, branch, or affiliate of the organization, or by any of the members of the organization under its authority or within its knowledge, together with the name of its author or authors and the name and address of the publisher;

(k) A description of all firearms or other weapons owned by the organization, or by any chapter, branch, or affiliate of the organization, identified by the manufacturer's number thereon;

(*l*) In case the organization is subject to foreign control, the manner in which it is so subject;

(m) A copy of the charter, articles of association, constitution, bylaws, rules, regulations, agreements, resolutions, and all other instruments relating to the organization, powers, and purposes of the organization and to the powers of the officers of the organization and of each chapter, branch, and affiliate of the organization; and

(n) Such other information and documents pertinent to the purposes of this section as the Attorney General may from time to time require.

All statements filed under this section shall be public records and open to public examination and inspection at all reasonable hours under such rules and regulations as the Attorney General may prescribe.

(C) The Attorney General is authorized at any time to make, amend, and rescind such rules and regulations as may be necessary to carry out this section, including rules and regulations governing the statements required to be filed.

(D) Whoever violates any of the provisions of this section shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Whoever in a statement filed pursuant to this section willfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made not misleading, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 14–17 (Oct. 17, 1940, ch. 897, §§ 1–4, 54 Stat. 1201–1204).

Section consolidates sections 14–17 of title 18, U.S.C., 1940 ed., as subsections (a), (b), (c), and (d), respectively, of this section, with necessary changes of phraseology and translation of section references.

Words "upon conviction" which preceded "be subject" were omitted as surplusage, as punishment cannot otherwise be imposed.

§ 2387. Activities affecting armed forces generally

(a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

(1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

(2) distributes or attempts to distribute any written or printed matter which advises, coun-

sels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

(b) For the purposes of this section, the term "military or naval forces of the United States" includes the Army of the United States, the Navy, Air Force, Marine Corps, Coast Guard, Naval Reserve, Marine Corps Reserve, and Coast Guard Reserve of the United States; and, when any merchant vessel is commissioned in the Navy or is in the service of the Army or the Navy, includes the master, officers, and crew of such vessel.

(As amended May 24, 1949, c. 139, § 46, 63 Stat. 96.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 9, 11, 13 (June 28, 1940, ch. 439, title I, §§ 1, 3, 5, 54 Stat. 670, 671).

Section consolidates sections 9, 11, and 13 of title 18, U.S.C., 1940 ed., with only such changes of phraseology as were necessary to effect consolidation.

The revised section extends the provisions so as to include the Coast Guard Reserve in its coverage.

Words "upon conviction thereof" were omitted as unnecessary, as punishment cannot be imposed until conviction is secured.

Reference to conspiracy to commit any of the prohibited acts was omitted as covered by the general law incorporated in section 371 of this title. (See reviser's note under that section.)

Minor changes were made in arrangement and phraseology.

1949 ACT

This section [section 46] inserts the words, "Air Force," in subsection (b) of section 2387 of title 18, U.S.C., in view of the establishment in 1947 of this separate branch of the armed services.

§ 2388. Activities affecting armed forces during war

(a) Whoever, when the United States is at war, willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; or

Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstructs the recruiting or enlistment service of the United States, to the injury of the service or the United States, or attempts to do so—

Shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) If two or more persons conspire to violate subsection (a) of this section and one or more such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in said subsection (a).

(c) Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under this section, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(d) This section shall apply within the admiralty and maritime jurisdiction of the United States, and on the high seas, as well as within the United States.

HISTORICAL AND REVISION NOTES

Based on sections 33, 34, 35, 37 of title 50, U.S.C., 1940 ed., War and National Defense (June 15, 1917, ch. 30, title I, §§ 3, 4, 5, 8, 40 Stat. 219; Mar. 3, 1921, ch. 136, 41 Stat. 1359; Mar. 28, 1940, ch. 72, § 2, 54 Stat. 79).

Sections 33, 34, 35, and 37 of title 50, U.S.C., 1940 ed., War and National Defense, were consolidated. Sections 34, 35, and 37 of title 50, U.S.C., 1940 ed., War and National Defense, are also incorporated in sections 791, 792, and 794 of this title, to which they relate.

Minor changes were made in phraseology.

§ 2389. Recruiting for service against United States

Whoever recruits soldiers or sailors within the United States, or in any place subject to the jurisdiction thereof, to engage in armed hostility against the same; or

Whoever opens within the United States, or in any place subject to the jurisdiction thereof, a recruiting station for the enlistment of such soldiers or sailors to serve in any manner in armed hostility against the United States—

Shall be fined not more than $1,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 7 (Mar. 4, 1909, ch. 321, § 7, 35 Stat. 1089).

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 2390. Enlistment to serve against United States

Whoever enlists or is engaged within the United States or in any place subject to the jurisdiction thereof, with intent to serve in armed hostility against the United States, shall be fined $100 or imprisoned not more than three years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 8 (Mar. 4, 1909, ch. 321, § 8, 35 Stat. 1089).

Mandatory punishment provision was rephrased in the alternative.

Minor changes were made in phraseology.

§ 2391. Temporary extension of section 2388

The provisions of section 2388 of this title, as amended and extended by section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under section 2388 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

(Added June 30, 1953, c. 175, § 6, 67 Stat. 134.)

References in Text. Section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), referred to in text, was repealed.

Proc. 2912, 3 C.F.R., 1950 Supp., p. 71, referred to in text, probably means Proc. 2914.

CHAPTER 117—WHITE SLAVE TRAFFIC

Sec.
2421. Transportation generally.
2422. Coercion or enticement of female.
2423. Transportation of minors.
2424. Filing factual statement about alien female.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2421. Transportation generally

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(As amended May 24, 1949, c. 139, § 47, 63 Stat. 96.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed. §§ 397, 398, 401, 404 (June 25, 1910, ch. 395, §§ 1, 2, 5, 8, 36 Stat. 825–827).

Section consolidates sections 397, 398, 401, and 404 of title 18, U.S.C., 1940 ed.

Section 397 of title 18, U.S.C., 1940 ed., containing a definition of the terms "interstate commerce" and "foreign commerce" was omitted as unnecessary in view of the definition of those terms in section 10 of this title.

Section 401 of title 18, U.S.C., 1940 ed., prescribing venue was omitted as unnecessary in view of section 3237 of this title.

Section 403 of title 18, U.S.C., 1940 ed., was omitted. No definition of "Territory" is necessary to the revised section as it is phrased. Construction therein of "person" is covered by section 1 of title 1, U.S.C., 1940 ed., General Provisions, as amended. Last paragraph of said section relating to construction of this chapter was omitted as surplusage.

Words "Possession of the United States" were inserted in three places in view of mission of said section 403 of title 18, U.S.C., 1940 ed., and, reference in that section to the Canal Zone is covered by those words. This chapter applies to the Territory of Hawaii. (See *Sun Chong Lee v. United States*, C.C.A. Hawaii, 1942, 125 F.2d 95.)

Section 404 of title 18, U.S.C., 1940 ed., containing the short title was omitted as not appropriate in a revision.

Reference to persons causing, procuring, aiding or assisting was deleted as unnecessary because such persons are made principals by section 2 of this title.

Words "and upon conviction thereof" were also deleted as surplusage since punishment cannot be imposed until a conviction is secured.

Words "deemed guilty of a felony" were deleted as unnecessary in view of the definition of a felony in section 1 of this title. (See reviser's note under section 550 of this title.)

Minor changes were also made in translations and phraseology.

1949 ACT

This section [section 47] corrects a typographical error in section 2421 of title 18, U.S.C.

§ 2422. Coercion or enticement of female

Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 399 (June 25, 1910, ch. 395, § 3, 36 Stat. 825).

Words "deemed guilty of a felony" were deleted as unnecessary in view of definition of felony in section 1 of this title. (See reviser's note under section 550 of this title.)

Words "and on conviction thereof shall be" were deleted as surplusage since punishment cannot be imposed until a conviction is secured.

The references to persons causing, procuring, aiding or assisting were omitted as unnecessary as such persons are made principals by section 2 of this title.

Words "Possession of the United States" were inserted twice. (See reviser's note under section 2421 of this title.)

Minor changes were made in phraseology.

§ 2423. Transportation of minors

(a) Any person who transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of, any minor in interstate or foreign commerce, or within the District of Columbia or any territory or other possession of the United States, with the intent—

(1) that such minor engage in prostitution; or

(2) that such minor engage in prohibited sexual conduct, if such person so transporting, financing, causing, or facilitating movement knows or has reason to know that such prohibited sexual conduct will be commercially exploited by any person;

shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in this section—

(1) the term "minor" means a person under the age of eighteen years;

(2) the term "prohibited sexual conduct" means—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sado-masochistic abuse (for the purpose of sexual stimulation); or

(E) lewd exhibition of the genitals or pubic area of any person; and

(3) the term "commercial exploitation" means having as a direct or indirect goal monetary or other material gain.

(As amended Feb. 6, 1978, Pub.L. 95–225, § 3(a), 92 Stat. 8.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 400 (June 25, 1910, ch. 395, § 4, 36 Stat. 826).

Words "deemed guilty of a felony" were deleted as unnecessary in view of definition of felony in section 1 of this title. (See reviser's note under section 550 of this title.)

Words "and on conviction thereof shall be" were deleted as surplusage since punishment cannot be imposed until a conviction is secured.

Words "Possession of the United States" were inserted twice. (See reviser's note under section 2421 of this title.)

Minor changes were made in phraseology.

§ 2424. Filing factual statement about alien female

(a) Whoever keeps, maintains, controls, supports, or harbors in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she has entered the United States from any country, party to the arrangement adopted July 25, 1902, for the suppression of the white-slave traffic, shall file with the Commissioner of Immigration and Naturalization a statement in writing setting forth the name of such alien woman or girl, the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parent-

age, and concerning her procuration to come to this country within the knowledge of such person; and

Whoever fails within thirty days after commencing to keep, maintain, control, support, or harbor in any house or place for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl within three years after she has entered the United States from any country, party to the said arrangement for the suppression of the white-slave traffic, to file such statement concerning such alien woman or girl with the Commissioner of Immigration and Naturalization; or

Whoever knowingly and willfully states falsely or fails to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman or girl, or concerning her procuration to come to this country—

Shall be fined not more than $2,000 or imprisoned not more than two years, or both.

(b) In any prosecution brought under this section, if it appears that any such statement required is not on file in the office of the Commissioner of Immigration and Naturalization, the person whose duty it is to file such statement shall be presumed to have failed to file said statement, unless such person or persons shall prove otherwise. No person shall be excused from furnishing the statement, as required by this section, on the ground or for the reason that the statement so required by him, or the information therein contained, might tend to criminate him or subject him to a penalty or forfeiture, but no information contained in the statement or any evidence which is directly or indirectly derived from such information may be used against any person making such statement in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this section.

(As amended Oct. 15, 1970, Pub.L. 91–452, Title II, § 226, 84 Stat. 930.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 402(2), (3) (June 25, 1910, ch. 395, § 6, 36 Stat. 826).

First paragraph of section 402 of title 18, U.S.C., 1940 ed., was omitted from this section and recommended for transfer to Title 8, Aliens and Nationality.

Words "shall be deemed guilty of a misdemeanor" were omitted as unnecessary in view of the definition of a misdemeanor in section 1 of this title. (See reviser's note under section 212 of this title.)

Minor changes were made in phraseology.

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Sec.
2510. Definitions.
2511. Interception and disclosure of wire or oral communications prohibited.
2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited.
2513. Confiscation of wire or oral communication intercepting devices.
[2514. Repealed.]
2515. Prohibition of use as evidence of intercepted wire or oral communications.
2516. Authorization for interception of wire or oral communications.
2517. Authorization for disclosure and use of intercepted wire or oral communications.
2518. Procedure for interception of wire or oral communications.
2519. Reports concerning intercepted wire or oral communications.
2520. Recovery of civil damages authorized.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 212.)

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring ex-

cept for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654; Pub.L. 95-511, Title II, § 201(a)-(c), Oct. 25, 1978, 92 Stat. 1796, 1797; Pub.L. 98-549, § 6(b)(2), Oct. 30, 1984, 98 Stat. 2804.)

References in Text. The Foreign Intelligence Surveillance Act of 1978, referred to in par. (2)(e) and (f), is classified to section 1801 et seq. of Title 50, U.S.C.A., War and National Defense, and section 101 of such Act is classified to section 1801 of Title 50.

Sections 705 and 706 of the Communications Act of 1934, referred to in par. (2)(e) and (f), are classified to sections 605 and 606, respectively, of Title 47, U.S.C.A., Telegraphs, Telephones, and Radiotelegraphs.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 214.)

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 215.)

[§ 2514. Repealed. Pub.L. 91–452, Title II, § 227(a), Oct. 15, 1970, 84 Stat. 930.]

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 216.)

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant

Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential and Presidential staff assassination, kidnaping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), section 2252 or 2253 (sexual exploitation of children), sections 2251 and 2252 (sexual exploitation of children), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnaping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions); or

(h) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91–452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub.L. 91–644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891; Pub.L. 95–598, Title III, § 314(h), Nov. 6, 1978, 92 Stat. 2677; Pub.L. 97–285, §§ 2(e), 4(e), Oct. 6, 1982, 96 Stat. 1220, 1221; Pub.L. 98–292, § 8, May 21, 1984, 98 Stat. 206; Pub.L. 98–473, Title II, § 1203(c), Oct. 12, 1984, 98 Stat. 2152.)

References in Text. The Atomic Energy Act of 1954, referred to in par. (1)(a), is classified generally to section 2011 et seq. of Title 42, U.S.C.A., The Public Health and Welfare.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has

obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 217 and amended Pub.L. 91-452, Title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.)

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists that involves—

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for

approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of-section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived

therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 218, and amended Pub.L. 91–358, Title II, § 211(b), July 29, 1970, 84 Stat. 654; Pub.L. 95–511, Title II, § 201(d)–(g), Oct. 25, 1978, 92 Stat. 1797, 1798; Pub.L. 98–473, Title II, § 1203(a), (b), Oct. 12, 1984, 98 Stat. 2152.)

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications pursuant to this chapter and the number of orders and extensions granted or denied pursuant to this chapter during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

(Added Pub.L. 90–351, Title III, § 802, June 19, 1968, 82 Stat. 222, and amended Pub.L. 95–511, Title II, § 201(h), Oct. 25, 1978, 92 Stat. 1798.)

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

(Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub.L. 91-358, Title II, § 211(c), July 29, 1970, 84 Stat. 654.)

PART II—CRIMINAL PROCEDURE

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Amendment of Chapter Analysis

Section 212(b) of Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 2011, provided that, effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473, the chapter analysis of Part II of this title is amended by striking out the items relating to chapters 227, 229, and 231, and inserting in lieu thereof the following:

"227. Sentences 3551
"229. Post-Sentence Administration 3601
"231. Repealed .....
"232. Miscellaneous Sentencing Provisions .... 3661".

Effective Date of 1984 Amendment. Addition of item for chapter 232 effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98–473.

CHAPTER 201—GENERAL PROVISIONS

Sec.	
3001.	Procedure governed by rules; scope, purpose and effect; definition of terms; local rules; forms—Rule.
3002.	Courts always open—Rule.
3003.	Calendars—Rule.
3004.	Decorum in courtroom [1]—Rule.
3005.	Counsel and witnesses in capital cases.
3006.	Assignment of counsel—Rule.
3006A.	Adequate representation of defendants.
3007.	Motions—Rule.
3008.	Service and filing of papers—Rule.
3009.	Records—Rule.
3010.	Exceptions unnecessary—Rule.
3011.	Computation of time—Rule.
3012.	Orders respecting persons in custody.
3013.	Special assessment on convicted persons.

[1] So in original. Catchline reads "court room".

Amendment of Section Analysis

Section 218(c) of Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 2027, provided that item 3012 is amended to read "3012. Repealed." effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Effective Date of 1984 Amendment. Addition of item 3013 effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98–473.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3001. Procedure governed by rules; scope, purpose and effect; definition of terms; local rules; forms—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Scope, Rule 1.

Purpose and construction, Rule 2.

Proceedings to which rules apply, Rules 54 and 59.

Definitions, Rule 54(c).

Rules of District Courts and Circuit Courts of Appeal, Rule 57.

Forms, Rule 58.

Effective date, Rule 59.

Citation of rule, Rule 60.

§ 3002. Courts always open—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Business hours, Rule 56.

§ 3003. Calendars—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Preference to criminal cases, Rule 50.

§ 3004. Decorum in court room—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Photographing or radio broadcasting prohibited, Rule 53.

§ 3005. Counsel and witnesses in capital cases

Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 563 (R.S. § 1034). Changes were made in phraseology.

§ 3006. Assignment of counsel—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Appointment by court, Rule 44.

Accused to be informed of right to counsel, Rules 5 and 44.

§ 3006A. Adequate representation of defendants

(a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), (4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (h).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel.—Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) Duration and substitution of appointments.—A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation.—

(1) Hourly rate.—Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts.—For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $2,000 for each attorney in a case in which one or more felonies are charged, and $800 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $2,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $500 for each attorney in each proceeding in each court.

(3) Waiving maximum amounts.—Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims.—A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

(5) New trials.—For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

(6) Proceedings before appellate courts.—If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

(e) Services other than counsel.—

(1) Upon request.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter

over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.—Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.

(3) Maximum amounts.—Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

(f) Receipt of other payments.—Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

(g) Discretionary appointments.—Any person subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (d) and (e).

(h) Defender organization.—

(1) Qualifications.—A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) Types of defender organizations.—

(A) Federal Public Defender Organization.—A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director

of the Administrative Office shall submit, similarly as under title 28, United States Code, section 605, and subject to the conditions of that section, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) Community Defender Organization.—A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under this section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the coming year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to establish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.

(i) Rules and reports.—Each district court and court of appeals of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

(j) Appropriations.—There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

(k) Districts included.—The term "district court" as used in this section includes the District Court of the Virgin Islands, the District Court of Guam, and the district courts of the United States created by chapter 5 of title 28, United States Code.

(*l*) Applicability in the District of Columbia.—The provisions of this Act, other than subsection (h) of section 1, shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this Act shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

(Added Pub.L. 88–455, § 2, Aug. 20, 1964, 78 Stat. 552, and amended Pub.L. 90–578, Title III, § 301(a)(1), Oct. 17, 1968, 82 Stat. 1115; Pub.L. 91–447, § 1, Oct. 14, 1970, 84 Stat. 916; Pub.L. 93–412, § 3, Sept. 3, 1974, 88 Stat. 1093; Pub.L. 97–164, Title II, § 206(a), (b), Apr. 2, 1982, 96 Stat. 53; Pub.L. 98–473, Title II, §§ 405, 1901, Oct. 12, 1984, 98 Stat. 2067, 2185.)

Amendment of Subsecs. (a)(1), (3), (b), and (g)

Section 223(e) of Pub.L. 98–473, Oct. 12, 1984, 98 Stat. 2028, 2031, provided that, effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473 this section is amended in subsections (a)(1) and (b), by deleting "misdemeanor (other than a petty offense as defined in section 1 of this title)" each place it appears and substituting "Class A misdemeanor"; and in subsections (a)(3) and (g), deleting "subject to revocation of parole," each place it appears.

References in Text. The provisions of this Act, other than subsection (h) of section 1, referred to in subsec. (1), probably means the provisions of this section, other than subsection (h) thereof.

Savings Provisions. Section 206(c) of Pub. L. 97–164 provided that: "The amendments made by subsection (a) of this section [amending subsec. (h)(2)(A) of this section] shall not affect the term of existing appointments."

Short Title of 1984 Amendment. Section 1901 of Pub.L. 98–473, Title II, c. XIX, Oct. 12, 1984, 98 Stat. 2185, provided: "This chapter [chapter XIX of Title II of Pub.L. 98–473] may be cited as the 'Criminal Justice Act Revision of 1984'."

§ 3007. Motions—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Motions substituted for pleas in abatement and special pleas in bar, Rule 12.

Form and contents, Rule 47.

§ 3008. Service and filing of papers—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Requirement and manner of service; notice of orders; filing papers, Rule 49.

§ 3009. Records—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Keeping of records by district court clerks and magistrates, Rule 55.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(4), 82 Stat. 1115.)

§ 3010. Exceptions unnecessary—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Objections substituted for exceptions, Rule 51.

§ 3011. Computation of time—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Computation; enlargement; expiration of term; motions and affidavits; service by mail, Rule 45.

§ 3012. Orders respecting persons in custody

Prisoners or persons in custody shall be brought into court or returned on order of the Court or of the United States Attorney, for which no fee shall be charged and no writ required.

Repeal of Section

Section 218(a)(2) of Pub.L. 98-473, Oct. 12, 1984, 98 Stat. 2027, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 605 (R.S. § 1030).

Changes of phraseology were made without change of substance.

§ 3013. Special assessment on convicted persons

(a) The court shall assess on any person convicted of an offense against the United States—

(1) in the case of a misdemeanor—

(A) the amount of $25 if the defendant is an individual; and

(B) the amount of $100 if the defendant is a person other than an individual; and

(2) in the case of a felony—

(A) the amount of $50 if the defendant is an individual; and

(B) the amount of $200 if the defendant is a person other than an individual.

(b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

(Added Pub.L. 98-473, Title II, § 1405(a), Oct. 12, 1984, 98 Stat. 2174.)

Effective Date. Section effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98-473.

CHAPTER 203—ARREST AND COMMITMENT

Sec.

3041. Power of courts and magistrates.
3042. Extraterritorial jurisdiction.
[3043. Repealed.]
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3045. Internal revenue violations.
3046. Warrants or summons—Rule.
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3049. Warrant for removal.
3050. Bureau of Prisons employees' powers.
[3051. Repealed.]
3052. Powers of Federal Bureau of Investigation.
3053. Powers of marshals and deputies.
3054. Officer's powers involving animals and birds [1].
3055. Officers' powers to suppress Indian liquor traffic.
3056. Powers, authorities, and duties of United States Secret Service.
3057. Bankruptcy investigations.
3058. Interned belligerent nationals.
3059. Rewards and appropriations therefor.
3060. Preliminary examination.
3061. Powers of postal personnel.
3062. General arrest authority for violation of release conditions.

[1] Section was repealed by Pub. L. 97-79 without striking item 3054 from analysis of sections.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3041. Power of courts and magistrates

For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining, pursuant to the provisions of section 3142 of this title, whether to detain or conditionally release the prisoner prior to trial or to discharge him from arrest.

(As amended June 22, 1966, Pub.L. 89-465, § 5(a), 80 Stat. 217; Oct. 17, 1968, Pub.L. 90-578, Title III, § 301(a)(1), (3), 82 Stat. 1115; Oct. 12, 1984, Pub.L. 98-473, Title II, § 204(a), 98 Stat. 1985.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 591 (R.S. § 1014; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 2, 1901, ch. 814, 31 Stat. 956).

This section was completely rewritten to omit all provisions superseded by Federal Rules of Criminal Procedure, rules 3, 4, 5, 40 and 54(a) which prescribed the procedure for preliminary proceedings and examinations before United States judges and commissioners and for removal proceedings but not for preliminary examinations before State magistrates.

§ 3042. Extraterritorial jurisdiction

Section 3041 of this title shall apply in any country where the United States exercises extraterritorial jurisdiction for the arrest and removal therefrom to the United States of any citizen or national of the United States who is a fugitive from justice charged with or convicted of the commission of any offense against the United States, and shall also apply throughout the United States for the arrest and removal therefrom to the jurisdiction of any officer or representative of the United States vested with judicial authority in any country in which the United States exercises extraterritorial jurisdiction, of any citizen or national of the United States who is a fugitive from justice charged with or convicted of the commission of any offense against the United States in any country where it exercises extraterritorial jurisdiction.

Such fugitive first mentioned may, by any officer or representative of the United States vested with judicial authority in any country in which the United States exercises extraterritorial jurisdiction and agreeably to the usual mode of process against offenders subject to such jurisdiction, be arrested and detained or conditionally released pursuant to section 3142 of this title, as the case may be, pending the issuance of a warrant for his removal, which warrant the principal officer or representative of the United States vested with judicial authority in the country where the fugitive shall be found shall seasonably issue, and the United States marshal or corresponding officer shall execute.

Such marshal or other officer, or the deputies of such marshal or officer, when engaged in executing such warrant without the jurisdiction of the court to which they are attached, shall have all the powers of a marshal of the United States so far as such powers are requisite for the prisoner's safekeeping and the execution of the warrant.

(As amended Oct. 1, 1984, Pub.L. 98–473, Title II, § 204(b), 98 Stat. 1985.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 662b (Mar. 22, 1934, ch. 73, § 1, 48 Stat. 454).

Words "crime or" before "offense" were omitted as unnecessary.

Words "and the Philippine Islands" were deleted in two places as obsolete in view of the independence of the Commonwealth of the Philippines effective July 4, 1946.

Words "its Territories, Districts, or possessions, including the Panama Canal Zone or any other territory governed, occupied, or controlled by it" were omitted as covered by section 5 of this title defining the term "United States".

Minor changes were made in phraseology.

[§ 3043. Repealed. Pub.L. 98–473, Title II, § 204(c), Oct. 12, 1984, 98 Stat. 1986]

Section, act June 25, 1948, c. 645, § 1, 62 Stat. 816, related to authority of federal and State judges and magistrates to hold to security of the peace and for good behavior.

§ 3044. Complaint—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Contents of complaint; oath, Rule 3.

§ 3045. Internal revenue violations

Warrants of arrest for violations of internal revenue laws may be issued by United States magistrates upon the complaint of a United States attorney, assistant United States attorney, collector, or deputy collector of internal revenue or revenue agent, or private citizen; but no such warrant of arrest shall be issued upon the complaint of a private citizen unless first approved in writing by a United States attorney.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(2), 82 Stat. 1115.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 594 (May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 2, 1901, c. 814, 31 Stat. 956).

Minor changes were made in phraseology.

Abolition of Offices of Collector and Deputy Collector of Internal Revenue. The offices of Collector and Deputy Collector of Internal Revenue were abolished.

§ 3046. Warrant or summons—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Issuance upon complaint, Rule 4.

Issuance upon indictment, Rule 9.

Summons on request of government; form; contents; service; return, Rules 4, 9.

§ 3047. Multiple warrants unnecessary

When two or more charges are made, or two or more indictments are found against any person, only one writ or warrant shall be necessary to commit him for trial. It shall be sufficient to state

in the writ the name or general character of the offenses, or to refer to them only in general terms.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 602 (R.S. § 1027).

Minor changes were made in phraseology.

§ 3048. Commitment to another district; removal—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Arrest in nearby or distant districts; informative statement by judge or magistrate; hearing and removal; warrant, Rule 40.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(3), 82 Stat. 1115.)

§ 3049. Warrant for removal

Only one writ or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 604 (R.S. § 1029).

§ 3050. Bureau of Prisons employees' powers

An officer or employee of the Bureau of Prisons of the Department of Justice may make arrests without warrant for violations of any of the provisions of sections 751, 752, 1791, or 1792 of this title, if he has reasonable grounds to believe that the arrested person is guilty of such offense, and if there is likelihood of his escaping before a warrant can be obtained for his arrest. If the arrested person is a fugitive from custody, he shall be returned to custody. Officers and employees of the said Bureau of Prisons may carry firearms under such rules and regulations as the Attorney General may prescribe.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 753k (June 29, 1940, ch. 449, § 5, 54 Stat. 693).

Section was broadened to include authority to make arrests for mutiny, riot or traffic in dangerous instrumentalities, by reference to section 1792 of this title.

Minor changes were made in phraseology and provision for taking arrested person before magistrate was omitted as covered by rule 5(a) of the Federal Rules of Criminal Procedure.

[§ 3051. Repealed. Oct. 31, 1951, c. 655, § 56(f), 65 Stat. 729.]

§ 3052. Powers of Federal Bureau of Investigation

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

(As amended Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239.)

HISTORICAL AND REVISION NOTES

Based on section 300a of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees (June 18, 1934, ch. 595, 48 Stat. 1008; Mar. 22, 1935, ch. 39, title II, 49 Stat. 77).

Language relating to seizures under warrant is in section 3107 of this title.

Minor changes were made in phraseology particularly with respect to omission of provision covered by rule 5(a) of Federal Rules of Criminal Procedure.

§ 3053. Powers of marshals and deputies

United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

HISTORICAL AND REVISION NOTES

Based on section 504a of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (June 15, 1935, ch. 259, § 2, 49 Stat. 378).

Minor changes were made in phraseology.

[§ 3054. Repealed. Pub. L. 97–79, § 9(b)(3), Nov. 16, 1981, 95 Stat. 1079]

§ 3055. Officers' powers to suppress Indian liquor traffic

The chief special officer for the suppression of the liquor traffic among Indians and duly authorized officers working under his supervision whose appointments are made or affirmed by the Commissioner of Indian Affairs or the Secretary of the Interior may execute all warrants of arrest and other lawful precepts issued under the authority of the United States and in the execution of his duty he may command all necessary assistance.

HISTORICAL AND REVISION NOTES

Based on section 250 of title 25, U.S.C., 1940 ed., Indians (Aug. 24, 1912, ch. 388, § 1, 37 Stat. 519).

The only change was to delete the words at the beginning of the section. "The powers conferred by section 504 of title 28 upon marshals and their deputies are conferred upon." and the addition, at the end of the section, of the phrase expressing such powers beginning with the words "may execute all warrants".

§ 3056. Powers, authorities, and duties of United States Secret Service

(a) Under the direction of the Secretary of the Treasury, the United States Secret Service is authorized to protect the following persons:

(1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.

(2) The immediate families of those individuals listed in paragraph (1).

(3) Former Presidents and their spouses for their lifetimes, except that protection of a spouse shall terminate in the event of remarriage.

(4) Children of a former President who are under 16 years of age.

(5) Visiting heads of foreign states or foreign governments.

(6) Other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad when the President directs that such protection be provided.

(7) Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates. As used in this paragraph, the term "major Presidential and Vice Presidential candidates" means those individuals identified as such by the Secretary of the Treasury after consultation with an advisory committee consisting of the Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority and minority leaders of the Senate, and one additional member selected by the other members of the committee.

The protection authorized in paragraphs (2) through (7) may be declined.

(b) Under the direction of the Secretary of the Treasury, the Secret Service is authorized to detect and arrest any person who violates—

(1) section 508, 509, 510, 871, or 879 of this title or, with respect to the Federal Deposit Insurance Corporation, Federal land banks, and Federal land bank associations, section 213, 216, 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, or 1909 of this title;

(2) any of the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments; or

(3) any of the laws of the United States relating to electronic fund transfer frauds, credit and debit card frauds, and false identification documents or devices; except that the authority conferred by this paragraph shall be exercised subject to the agreement of the Attorney General and the Secretary of the Treasury and shall not affect the authority of any other Federal law enforcement agency with respect to those laws.

(c)(1) Under the direction of the Secretary of the Treasury, officers and agents of the Secret Service are authorized to—

(A) execute warrants issued under the laws of the United States;

(B) carry firearms;

(C) make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony;

(D) offer and pay rewards for services and information leading to the apprehension of persons involved in the violation or potential violation of those provisions of law which the Secret Service is authorized to enforce;

(E) pay expenses for unforeseen emergencies of a confidential nature under the direction of the Secretary of the Treasury and accounted for solely on the Secretary's certificate; and

(F) perform such other functions and duties as are authorized by law.

(2) Funds expended from appropriations available to the Secret Service for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriations available to the Secret Service at the time of the reimbursement.

(d) Whoever knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions authorized by this section or by section 1752 of this title shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(As amended July 16, 1951, c. 226, § 4, 65 Stat. 122; Aug. 31, 1954, c. 1143, § 2, 68 Stat. 999; Aug. 18, 1959, Pub.L. 86-168, Title I, § 104(h), 73 Stat. 387; Oct. 10, 1962, Pub.L. 87-791, 76 Stat. 809; Oct. 15, 1962, Pub.L. 87-829, § 3, 76 Stat. 956; Sept. 15, 1965, Pub.L. 89-186, 79 Stat. 791; Sept. 29, 1965, Pub.L. 89-218, 79 Stat. 890; Oct. 21, 1968, Pub.L. 90-608, ch. XI, § 1101, 82 Stat. 1198; Jan. 2, 1971, Pub.L. 91-644, Title V, § 19, 84 Stat. 1892; Jan. 5, 1971, Pub.L. 91-651, § 4, 84 Stat. 1941; July 12, 1974, Pub.L. 93-346, § 8, as added Dec. 27, 1974, Pub.L. 93-552, Title VI, § 609(a), 88 Stat. 1765; Sept. 11, 1976, Pub.L. 94-408, § 2, 90 Stat. 1239; Oct. 12, 1982, Pub.L. 97-297, § 3, 96 Stat. 1318; Oct. 14, 1982, Pub.L. 97-308, § 2, 96 Stat. 1452; Nov. 14, 1983, Pub.L. 98-151, § 115(b), 98 Stat. 977; Oct. 30, 1984, Pub.L. 98-587, § 1(a), 98 Stat. 3110.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 148, and on sections 264(x) and 986 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913), ch. 6, § 12B, subsection (x), as added June 16, 1933, ch. 89, § 8, 48 Stat. 178; July 17, 1916, ch. 245, § 31, sixth paragraph, 39 Stat. 382 (384); Dec. 11, 1926, ch. 2, § 3, 44 Stat. 918; Aug. 23, 1935, ch. 614, § 101, 49 Stat. 684, 703).

Section consolidates said section 148 of title 18, U.S.C., 1940 ed., and said sections 264(x) and 986 of title 12, U.S.C., 1940 ed., Banks and Banking.

Said section 148 of title 12, U.S.C., 1940 ed., Banks and Banking, was concerned with offenses relating to counterfeiting and passing, etc., of transportation requests and to the unlawful possession or making of plates, stones, etc., used in making such requests, which were defined in sections 146 and 147 of said title 18, now sections 508 and 509 of this title.

Said sections 264(x) and 986 of title 12, U.S.C., 1940 ed., Banks and Banking, were concerned with various offenses as defined in sections 981–985, 987 of said title 12, relating to Federal land banks, joint-stock land banks and national farm loan associations, and as defined in section 264 of said title 12 relating to the Federal Deposit Insurance Corporation. All of the provisions of said sections 981–985, 987 of said title 12, and the criminal provisions of said section 264 of said title 12, were transferred to this title where they were, in some instances, consolidated with similar provisions from other sections. Such provisions are now incorporated in sections 218, 221, 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, and 1909 of this title. In most instances, these sections, as the result of the consolidations, relate to other organizations as well as those mentioned above, but, by enumerating the Federal Deposit Insurance Corporation, Federal land banks, joint-stock land banks, and national farm loan associations in this section, the powers of the Secret Service are not broadened beyond what they were in said sections 264(x) and 986 of said title 12.

In this section, the wording of said section 148 of title 18, U.S.C., 1940 ed., and section 986 of title 12, U.S.C., 1940 ed., Banks and Banking reading "The Secretary of the Treasury is hereby authorized to direct and use the Secret Service Division of the Treasury Department" was adopted, rather than the wording of said section 264(x) of said title 12, which read "The Secret Service Division of the Treasury Department is authorized."

Words, "of the United States marshal having jurisdiction", following "custody" in all three of said sections, were omitted as surplusage.

Changes were made in phraseology.

Personal Protection of Major Presidential or Vice-Presidential Candidates and Spouses. Pub.L. 90–331, June 6, 1968, 82 Stat. 170, amended by Pub.L. 94–408, § 1, Sept. 11, 1976, 90 Stat. 1239; Pub.L. 94–524, § 11, Oct. 17, 1976, 90 Stat. 2477; Pub.L. 96–329, Aug. 11, 1980, 94 Stat. 1029, which authorized the Secret Service to protect major presidential or vice-presidential candidates and their spouses, was repealed by Pub.L. 98–587, § 2, Oct. 30, 1984, 98 Stat. 3111.

Presidential Protection Assistance Act of 1976. Pub.L. 94–524, §§ 1 to 10, Oct. 17, 1976, 90 Stat. 2475, provided:

"That this Act may be cited as the 'Presidential Protection Assistance Act of 1976'.

"Sec. 2. As used in this Act the term—

"(1) 'Secret Service' means the United States Secret Service, the Department of the Treasury;

"(2) 'Director' means the Director of the Secret Service;

"(3) 'protectee' means may person eligible to receive the protection authorized by section 3056 of title 18, United States Code, or Public Law 90–331 (82 Stat. 170) [set out above];

"(4) 'Executive departments' has the same meaning as provided in section 101 of title 5, United States Code;

"(5) 'Executive agencies' has the same meaning as provided in section 105 of title 5, United States Code;

"(6) 'Coast Guard' means the United States Coast Guard, Department of Transportation or such other Executive department or Executive agency to which the United States Coast Guard may subsequently be transferred;

"(7) 'duties' means all responsibilities of an Executive department or Executive agency relating to the protection of any protectee; and

"(8) 'non-Governmental property' means any property owned, leased, occupied, or otherwise utilized by a protectee which is not owned or controlled by the Government of the United States of America.

"Sec. 3. (a) Each protectee may designate one non-governmental property to be fully secured by the Secret Service on a permanent basis.

"(b) A protectee may thereafter designate a different non-Governmental property in lieu of the non-Governmental property previously designated under subsection (a) (hereinafter in this Act referred to as the 'previously designated property') as the one non-Governmental property to be fully secured by the Secret Service on a permanent basis under subsection (a). Thereafter, any expenditures by the Secret Service to maintain a permanent guard detail or for permanent facilities, equipment, and services to secure the non-Governmental property previously designated under subsection (a) shall be subject to the limitations imposed under section 4.

"(c) For the purposes of this section, where two or more protectees share the same domicile, such protectees shall be deemed a single protectee.

"Sec. 4. Expenditures by the Secret Service for maintaining a permanent guard detail and for permanent facilities, equipment, and services to secure any non-Governmental property in addition to the one non-Governmental property designated by each protectee under subsection 3(a) or 3(b) may not exceed a cumulative total of $10,000 at each such additional non-Governmental property, unless expenditures in excess of that amount are specifically approved by resolutions adopted by the Committees on Appropriations of the House and Senate, respectively.

"Sec. 5. (a) All improvements and other items acquired by the Federal Government and used for the purpose of securing any non-Governmental property in the performance of the duties of the Secret Service shall be the property of the United States.

"(b) Upon termination of Secret Service protection at any non-Governmental property all such improvements and other items shall be removed from the non-Governmental property unless the Director determines that it would not be economically feasible to do so; except that such improvements and other items shall be removed and the non-Governmental property shall be restored to its original state if the owner of such property at the time of termination requests the removal of such improvements or other items. If any such improvements or other items are not removed, the owner of the non-Governmental property at the time of termination shall compensate the United States for the original cost of such improvements or other items or for the amount by which they have increased the fair market value of the property, as determined by the Comptroller General of the United States, as of the date of termination, whichever is less.

"(c) In the event that any non-Governmental property becomes a previously designated property and Secret Service protection at that property has not been terminated, all such improvements and other items which the Director determines are not necessary to secure the previously designated property within the limitations imposed under section 4 shall be removed or compensated for in accordance with the procedures set forth under Subsection (b) of this section.

"Sec. 6. Executive departments and Executive agencies shall assist the Secret Service in the performance of its duties by providing services, equipment, and facilities on a temporary and reimbursable basis when requested by the Director and on a permanent and reimbursable basis upon advance written request of the Director; except that the Department of Defense and the Coast Guard shall provide such assistance on a temporary basis without reimbursement when assisting the Secret Service in its duties directly related to the protection of the President or the Vice President or other officer immediately next in order of succession to the office of the President.

"Sec. 7. No services, equipment, or facilities may be ordered, purchased, leased, or otherwise procured for the purposes of carrying out the duties of the Secret Service by persons other than officers or employees of the Federal Government duly authorized by the Director to make such orders, purchases, leases, or procurements.

"Sec. 8. No funds may be expended or obligated for the purpose of carrying out the purposes of section 3056 of title 18, United States Code, and section 1 of Public Law 90–331 [set out above] other than funds specifically appropriated to the Secret Service for those purposes with the exception of—

"(1) expenditures made by the Department of Defense or the Coast Guard from funds appropriated to the Department of Defense or the Coast Guard in providing assistance on a temporary basis to the Secret Service in the performance of its duties directly related to the protection of the President or the Vice President or other officer next in order of succession to the office of the President; and

"(2) expenditures made by Executive departments and agencies, in providing assistance at the request of the Secret Service in the performance of its duties, and which will be reimbursed by the Secret Service under section 6 of this Act.

"Sec. 9. The Director, the Secretary of Defense, and the Commandant of the Coast Guard shall each transmit a detailed semi-annual report of expenditures made pursuant to this Act during the six-month period immediately preceding such report by the Secret Service, the Department of Defense, and the Coast Guard, respectively, to the Committees on Appropriations, Committees on the Judiciary, and Committees on Government Operations of the House of Representatives and the Senate [now Senate Committee on Government Affairs], respectively, on March 31 and September 30, of each year.

"Sec. 10. Expenditures made pursuant to this Act shall be subject to audit by the Comptroller General and his authorized representatives, who shall have access to all records relating to such expenditures. The Comptroller General shall transmit a report of the results of any such audit to the Committees on Appropriations, Committees on the Judiciary, and Committees on Government Operations of the House of Representatives and the Senate, respectively."

§ 3057. Bankruptcy investigations

(a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has[1] been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

(As amended May 24, 1949, c. 139, § 48, 63 Stat. 96; Nov. 6, 1978, Pub.L. 95–598, Title III, § 314(i), 92 Stat. 2677.)

[1] So in original.

Historical and Revision Notes

1948 Act

Based on section 52(e)(1), (2) of title 11, U.S.C., 1940 ed., Bankruptcy (July 1, 1898, ch. 541, § 29e(1), (2), as added by May 27, 1926, ch. 406, § 11, 44 Stat. 665, 666; June 22, 1938, ch. 575, § 1, 52 Stat. 840, 856).

Remaining provisions of section 52 of title 11, U.S.C., 1940 ed., Bankruptcy, constitute sections 151–154, and 3284 of this title.

The words "or laws relating to insolvent debtors, receiverships, or reorganization plans" were inserted to avoid reference to "Title 11".

Minor changes were made in phraseology.

1949 Act

This section [section 48] clarifies the meaning of section 3057 of title 18, U.S.C., by expressly limiting to laws "of the United States", violations of laws which are to be reported to the United States attorney.

§ 3058. Interned belligerent nationals

Whoever, belonging to the armed land or naval forces of a belligerent nation or belligerent faction and being interned in the United States, in accordance with the law of nations, leaves or attempts to leave said jurisdiction, or leaves or attempts to leave the limits of internment without permission from the proper official of the United States in charge, or willfully overstays a leave of absence granted by such official, shall be subject to arrest by any marshal or deputy marshal of the United States, or by the military or naval authorities thereof, and shall be returned to the place of internment and there confined and safely kept for such period of time as the official of the United States in charge shall direct.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 37 (June 15, 1917, ch. 30, title V, § 7, 40 Stat. 223).

Said section 37 was incorporated in this section and section 756 of this title.

Minor verbal changes were made.

§ 3059. Rewards and appropriations therefor

(a)(1) There is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $25,000 as a reward or rewards for the capture of anyone who is charged with violation of criminal laws of the United States or any State or of the District of Columbia, and an equal amount as a reward or rewards for information leading to the arrest of any such person, to be apportioned and expended in the discretion of, and upon such conditions as may be imposed by, the Attorney General of the United States. Not more than $25,000 shall be expended for information or capture of any one person.

(2) If any of the said persons shall be killed in resisting lawful arrest, the Attorney General may pay any part of the reward money in his discretion to the person or persons whom he shall adjudge to be entitled thereto but no reward money shall be paid to any official or employee of the Department of Justice of the United States.

(b) The Attorney General each year may spend not more than $10,000 for services or information looking toward the apprehension of narcotic law violators who are fugitives from justice.

(As amended Sept. 13, 1982, Pub.L. 97-258, § 2(d)(2), 96 Stat. 1058.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 575 (June 6, 1934, ch. 408, 48 Stat. 910).

Changes were made in phraseology.

1982 Act

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
3059(b)	31:1023(c).	June 1, 1955, ch. 119, § 1(c), 69 Stat. 82.

The words "Attorney General" are substituted for "Secretary of the Treasury" because of section 1 of Reorganization Plan No. 2 of 1973 (eff. July 1, 1973, 87 Stat. 1091).

§ 3060. Preliminary examination

(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be contin-

ued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

(f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 303(a), 82 Stat. 1117.)

§ 3061. Powers of postal personnel

(a) Subject to subsection (b) of this section, officers and employees of the Postal Service performing duties related to the inspection of postal matters may, to the extent authorized by the Board of Governors—

(1) serve warrants and subpenas issued under the authority of the United States;

(2) make arrests without warrant for offenses against the United States committed in their presence; and

(3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

(b) The powers granted by subsection (a) of this section shall be exercised only in the enforcement of laws regarding property of the United States in the custody of the Postal Service, including property of the Postal Service, the use of the mails, and other postal offenses.

(Added Pub.L. 90–560, § 5(a), Oct. 12, 1968, 82 Stat. 998, and amended Pub.L. 91–375, § 6(j)(38)(A), Aug. 12, 1970, 84 Stat. 781.)

§ 3062. General arrest authority for violation of release conditions

A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 207 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3142(c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), or (c)(2)(M), or, if the violation involves a failure to remain in a specified institution as required, a condition imposed pursuant to section 3142(c)(2)(J).

(Added Pub.L. 98–473, Title II, § 204(d), Oct. 12, 1984, 98 Stat. 1986.)

CHAPTER 204—REWARDS FOR INFORMATION CONCERNING TERRORIST ACTS.

Sec.
3071. Information for which rewards authorized.
3072. Determination of entitlement; maximum amount; Presidential approval; conclusiveness.
3073. Protection of identity.
3074. Exception of governmental officials.
3075. Authorization for appropriations.
3076. Eligibility for witness security program.
3077. Definitions.

§ 3071. Information for which rewards authorized

With respect to acts of terrorism primarily within the territorial jurisdiction of the United States, the Attorney General may reward any individual who furnishes information—

(1) leading to the arrest or conviction, in any country, of any individual or individuals for the commission of an act of terrorism against a

United States person or United States property; or

(2) leading to the arrest or conviction, in any country, of any individual or individuals for conspiring or attempting to commit an act of terrorism against a United States person or property; or

(3) leading to the prevention, frustration, or favorable resolution of an act of terrorism against a United States person or property.

(Added Pub.L. 98–533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2706.)

Short Title. Section 1 of Pub.L. 98–533, Oct. 19, 1984, 98 Stat. 2706, provided that "This Act [Pub.L. 98–533] may be cited as the '1984 Act to Combat International Terrorism'."

§ 3072. Determination of entitlement; maximum amount; Presidential approval; conclusiveness

The Attorney General shall determine whether an individual furnishing information described in section 3071 is entitled to a reward and the amount to be paid. A reward under this section may be in an amount not to exceed $500,000. A reward of $100,000 or more may not be made without the approval of the President or the Attorney General personally. A determination made by the Attorney General or the President under this chapter shall be final and conclusive, and no court shall have power or jurisdiction to review it.

(Added Pub.L. 98–533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

§ 3073. Protection of identity

Any reward granted under this chapter shall be certified for payment by the Attorney General. If it is determined that the identity of the recipient of a reward or of the members of the recipient's immediate family must be protected, the Attorney General may take such measures in connection with the payment of the reward as deemed necessary to effect such protection.

(Added Pub.L. 98–533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

§ 3074. Exception of governmental officials

No officer or employee of any governmental entity who, while in the performance of his or her official duties, furnishes, the information described in section 3071 shall be eligible for any monetary reward under this chapter.

(Added Pub.L. 98–533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

§ 3075. Authorization for appropriations

There are authorized to be appropriated, without fiscal year limitation, $5,000,000 for the purpose of this chapter.

(Added Pub.L. 98–533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

§ 3076. Eligibility for witness security program

Any individual (and the immediate family of such individual) who furnishes information which would justify a reward by the Attorney General under this chapter or by the Secretary of State under section 36 of the State Department Basic Authorities Act of 1956 may, in the discretion of the Attorney General, participate in the Attorney General's witness security program authorized under title V of the Organized Crime Control Act of 1970.

(Added Pub.L. 98–533, Title I, § 101(a), Oct. 19, 1984, 98 Stat. 2707.)

References in Text. Title V of the Organized Crime Control Act of 1970, referred to in text is Title V of Pub.L. 91–452, Oct. 15, 1970, 84 Stat. 933, which is set out as a note preceding section 3481 of this title.

§ 3077. Definitions

As used in this chapter, the term—

(1) "act of terrorism" means an activity that—

(A) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and

(B) appears to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion, or

(iii) to affect the conduct of a government by assassination or kidnaping.

(2) "United States person" means—

(A) a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(B) an alien lawfully admitted for permanent residence in the United States as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(C) any person within the United States;

(D) any employee or contractor of the United States Government, regardless of nationality, who is the victim or intended victim of an act of terrorism by virtue of that employment;

(E) a sole proprietorship, partnership, company, or association composed principally of

nationals or permanent resident aliens of the United States; and

(F) a corporation organized under the laws of the United States, any State, the District of Columbia, or any territory or possession of the United States, and a foreign subsidiary of such corporation.

(3) "United States property" means any real or personal property which is within the United States or, if outside the United States, the actual or beneficial ownership of which rests in a United States person or any Federal or State governmental entity of the United States.

(4) "United States"—

(A) when used in a geographical sense, includes Puerto Rico and all territories and possessions of the United States; and

(B) when used in the context of section 3073 shall have the meaning given to it in the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

(5) "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other possession or territory of the United States.

(6) "government entity" includes the Government of the United States, any State or political subdivision thereof, any foreign country, and any state, provincial, municipal or other political subdivision of a foreign country.

(7) "Attorney General" means the Attorney General of the United States or that official designated by the Attorney General to perform the Attorney General's responsibilities under this chapter.

(Added Pub.L. 98-533, Title I, § 101(a), Oct. 19, 1984, Stat. 2707.)

CHAPTER 205—SEARCHES AND SEIZURES

Sec.
3101. Effect of rules of court—Rule.
3102. Authority to issue search warrant—Rule.
3103. Grounds for issuing search warrant—Rule.
3103a. Additional grounds for issuing warrant.
3104. Issuance of search warrant; contents—Rule.
3105. Persons authorized to serve search warrant.
3106. Officer authorized to serve search warrant—Rule.
3107. Service of warrants and seizures by Federal Bureau of Investigation.
3108. Execution, service, and return—Rule.
3109. Breaking doors or windows for entry or exit.
3110. Property defined—Rule.
3111. Property seizable on search warrant—Rule.
3112. Search warrants for seizure of animals, birds or eggs [1].
3113. Liquor violations in Indian country.
3114. Return of seized property and suppression of evidence; motion—Rule.
3115. Inventory upon execution and return of search warrant—Rule.
3116. Records of examining magistrate; return to clerk of court—Rule.

[1] Section was repealed by Pub. L. 97-79 without striking out item 3112 from analysis of sections.

§ 3101. Effect of rules of court—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules generally applicable throughout United States, Rule 54.

Acts of Congress superseded, Rule 41(g).

References in Text. Rule 41(g), referred to in text, was relettered 41(h).

§ 3102. Authority to issue search warrant—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Federal, State or Territorial Judges, or U.S. Magistrates authorized to issue search warrants, Rule 41(a).

(As amended Oct. 17, 1968, Pub.L. 90-578, Title III, § 301(a)(4), 82 Stat. 1115.)

§ 3103. Grounds for issuing search warrant—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Grounds prescribed for issuance of search warrant, Rule 41(b).

§ 3103a. Additional grounds for issuing warrant

In addition to the grounds for issuing a warrant in section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States.

(Added Pub.L. 90-351, Title IX, § 1401(a), June 19, 1968, 82 Stat. 238.)

§ 3104. Issuance of search warrant; contents—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Issuance of search warrant on affidavit; contents to identify persons or place; command to search forthwith, Rule 41(c).

§ 3105. Persons authorized to serve search warrant

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 617 (June 15, 1917, ch. 30, title XI, § 7, 40 Stat. 229).

Minor change was made in phraseology.

§ 3106. Officer authorized to serve search warrant—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Officer to whom search warrant shall be directed, Rule 41(c).

§ 3107. Service of warrants and seizures by Federal Bureau of Investigation

The Director, Associate Director, Assistant to the Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to make seizures under warrant for violation of the laws of the United States.

(As amended Jan. 10, 1951, c. 1221, § 2, 64 Stat. 1239.)

HISTORICAL AND REVISION NOTES

Based on section 300a of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees (June 18, 1934, ch. 595, 48 Stat. 1008; Mar. 22, 1935, ch. 39, title II, 49 Stat. 77).

Section 300a of the title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees, was used as the basis for this section and section 3052 of this title.

§ 3108. Execution, service, and return—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Method and time for execution, service and return of search warrant, Rule 41(c), (d).

§ 3109. Breaking doors or windows for entry or exit

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 618, 619 (June 15, 1917, ch. 30, title XI, §§ 8, 9, 40 Stat. 229).

Said sections 618 and 619 were consolidated with minor changes in phraseology but without change of substance.

§ 3110. Property defined—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Term "property" as used in Rule 41 includes documents, books, papers and any other tangible objects, Rule 41(g).

References in Text. Rule 41(g), referred to in text, was relettered 41(h).

§ 3111. Property seizable on search warrant —(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Specified property seizable on search warrant, Rule 41(b).

[§ 3112. Repealed. Pub. L. 97-79, § 9(b)(3), Nov. 16, 1981, 95 Stat. 1079]

§ 3113. Liquor violations in Indian country

If any superintendent of Indian affairs, or commanding officer of a military post, or special agent of the Office of Indian Affairs for the suppression of liquor traffic among Indians and in the Indian country and any authorized deputies under his supervision has probable cause to believe that any person is about to introduce or has introduced any spirituous liquor, beer, wine or other intoxicating liquors named in sections 1154 and 1156 of this title into the Indian country in violation of law, he may cause the places, conveyances, and packages of such person to be searched. If any such intoxicating liquor is found therein, the same, together with such conveyances and packages of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and one-half to the use of the United States. If such person be a trader, his license shall be revoked and his bond put in suit.

Any person in the service of the United States authorized by this section to make searches and seizures, or any Indian may take and destroy any ardent spirits or wine found in the Indian country, except such as are kept or used for scientific, sacramental, medicinal, or mechanical purposes or such as may be introduced therein by the Department of the Army.

In all cases arising under this section and sections 1154 and 1156 of this title, Indians shall be competent witnesses.

(As amended Oct. 31, 1951, c. 655, § 30, 65 Stat. 721.)

HISTORICAL AND REVISION NOTES

Based on sections 246, 248, 252 of title 25, U.S.C., 1940 ed., Indians (R.S. § 2140; Mar 1, 1907, ch. 2285, 34 Stat. 1017; May 18, 1916, ch. 125, § 1, 39 Stat. 124).

Said sections 246, 248, and 252 were consolidated. References to Indian agent and subagent were deleted since

those positions no longer exist. See section 64 of title 25, U.S.C., 1940 ed., Indians, and notes thereunder.

Words "except such as are kept or used for scientific, sacramental, medicinal or mechanical purposes" were inserted. See revisor's note under section 1154 of this title.

Words "conveyances and packages" were substituted for the enumeration, "boats, teams, wagons and sleds * * and goods, packages and peltries."

Minor changes were made in phraseology.

§ 3114. Return of seized property and suppression of evidence; motion—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Return of property and suppression of evidence upon motion, Rule 41(e).

§ 3115. Inventory upon execution and return of search warrant—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Inventory of property seized under search warrant, and copies to persons affected, Rule 41(d).

§ 3116. Records of examining magistrate; return to clerk of court—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Magistrates and clerks of court to keep records as prescribed by Director of the Administrative Office of the United States Courts, Rule 55.

Return or filing of records with clerk, Rule 41(f).

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(4), 82 Stat. 1115.)

HISTORICAL AND REVISION NOTES

Section 627 of title 18, U.S.C., 1940 ed., relating to the filing of search warrants and companion papers, was omitted as unnecessary in view of Rule 41(f) of the Federal Rules of Criminal Procedure.

References in Text. Rule 41(f), referred to in text, was relettered 41(g).

CHAPTER 207—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

Sec.
3141. Release and detention authority generally.
3142. Release or detention of a defendant pending trial.
3143. Release or detention of a defendant pending sentence or appeal.
3144. Release or detention of a material witness.
3145. Review and appeal of a release or detention order.
3146. Penalty for failure to appear.
3147. Penalty for an offense committed while on release.
3148. Sanctions for violation of a release condition.
3149. Surrender of an offender by a surety.
3150. Applicability to a case removed from a State court.
[3150a. Repealed.]
[3151. Repealed.]
3152. Establishment of pretrial services.
3153. Organization and administration of pretrial services.
3154. Functions and powers relating to pretrial services.
3155. Annual reports.
3156. Definitions.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3141. Release and detention authority generally

(a) Pending Trial.—A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

(b) Pending sentence or appeal.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1976.)

Prior Provisions. A prior section 3141, act June 25, 1948, c. 645, 62 Stat. 683, amended Pub.L. 89–465, § 5(b), June 22, 1966, 80 Stat. 217, which related to bail power of courts and magistrates, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976.

Short Title of 1984 Amendment. Section 202 of Pub.L. 98–473, Title II, c. I, Oct. 12, 1984, 98 Stat. 1976, provided: "This chapter [chapter I of Title II of Pub.L. 98–473] may be cited as the 'Bail Reform Act of 1984'."

§ 3142. Release or detention of a defendant pending trial

(a) In general.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on his personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of subsection (b);

(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion pursuant to the provisions of subsection (d); or

(4) detained pursuant to the provisions of subsection (e).

(b) Release on personal recognizance or unsecured appearance bond.—The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on conditions.—If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(B) maintain employment, or, if unemployed, actively seek employment;

(C) maintain or commence an educational program;

(D) abide by specified restrictions on his personal associations, place of abode, or travel;

(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(G) comply with a specified curfew;

(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.—If the judicial officer determines that—

(1) the person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

he shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official

of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B), the person has the burden of proving to the court that he is a citizen of the United States or is lawfully admitted for permanent residence.

(e) Detention.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that—

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

(f) Detention hearing.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community in a case—

(1) upon motion of the attorney for the Government, that involves—

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death:

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed; or

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, that involves—

(A) a serious risk that the person will flee;

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported

by clear and convincing evidence. The person may be detained pending completion of the hearing.

(g) Factors to be considered.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of release order.—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of detention order.—In a detention order issued pursuant to the provisions of subsection (e), the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence.—Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1976.)

Prior Provisions. A prior section 3142, act June 25, 1948, c. 645, 62 Stat. 821; June 22, 1966, Pub.L. 89–465, § 5(c), 80 Stat. 217, relating to surrender by bail, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976. See section 3149 of this title.

§ 3143. Release or detention of a defendant pending sentence or appeal

(a) Release or detention pending sentence.—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if release pursuant to section 3142(b) or (c). If the judicial officer makes such a finding, he shall order the release of

the person in accordance with the provisions of section 3142(b) or (c).

(b) Release of detention pending appeal by the defendant.—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

(c) Release or detention pending appeal by the government.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1981.)

Amendment of Subsecs. (a) and (c)

Section 223(f) of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 2028, provided that, effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473, this section is amended:

(1) in subsection (a), by adding "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment," after "sentence,"; and

(2) in subsection (c), by adding the following at the end thereof: "The judge shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3742 in accordance with the provisions of—

"(1) subsection (a) if the person has been sentenced to a term of imprisonment; or

"(2) section 3142 if the person has not been sentenced to a term of imprisonment."

Prior Provisions. A prior section 3143, act June 25, 1948, c. 645, 62 Stat. 821; June 22, 1966, Pub. L. 89–465, § 5(d), 80 Stat. 217, providing for additional bail in cases where it appeared that a person was about to abscond and that the person's bail was insufficient, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat.1976.

§ 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1982.)

Prior Provisions. A prior section 3144, act June 25, 1948, c. 645, 62 Stat. 821, providing for bail in cases removed from State courts and brought to the Supreme Court of the United States, was repealed by Pub. L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat.1976. See section 3150 of this title.

§ 3145. Review and appeal of a release or detention order

(a) Review of a release order.—If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

(b) Review of a detention order.—If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) Appeal from a release or detention order.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of

section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1982.)

Prior Provisions. A prior section 3145, Act June 25, 1948, c. 645, 62 Stat. 821, carrying the section heading "Parties and witnesses" and referring the user to the Federal Rules of Criminal Procedure, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976.

§ 3146. Penalty for failure to appear

(a) Offense.—A person commits an offense if, after having been released pursuant to this chapter—

(1) he knowingly fails to appear before a court as required by the conditions of his release; or

(2) he knowingly fails to surrender for service of sentence pursuant to a court order.

(b) Grading.—If the person was released—

(1) in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction, for—

(A) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, he shall be fined not more than $25,000 or imprisoned for not more than ten years, or both;

(B) an offense punishable by imprisonment for a term of five or more years, but less than fifteen years, he shall be fined not more than $10,000 or imprisoned for not more than five years, or both;

(C) any other felony, he shall be fined not more than $5,000 or imprisoned for not more than two years, or both; or

(D) a misdemeanor, he shall be fined not more than $2,000 or imprisoned for not more than one year, or both; or

(2) for appearance as a material witness, he shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

A term of imprisonment imposed pursuant to this section shall be consecutive to the sentence of imprisonment for any other offense.

(c) Affirmative defense.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that he appeared or surrendered as soon as such circumstances ceased to exist.

(d) Declaration of forfeiture.—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) or is subject to the release condition set forth in section 3142 (c)(2)(K) or(c)(2)(L), the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1982.)

Prior Provisions. A prior section 3146, added Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 214, and amended Pub.L. 97–291, § 8, Oct. 12, 1982, 96 Stat. 1257, relating to release in noncapital cases prior to trial, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976. See section 3142 of this title.

Another prior section 3146, derived from Act Aug. 20, 1954, c. 772, § 1, 68 Stat. 747, which prescribed penalties for jumping bail, was stricken out by Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 214.

§ 3147. Penalty for an offense committed while on release

A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—

(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1983.)

Amendment of Section

Section 223(g) of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 2028, provided that, effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473, this section is amended, in paragraph (1), by deleting "not less than two years and" and, in paragraph (2), by deleting "not less than ninety days and".

Prior Provisions. A prior section 3147, added Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 215, providing for an appeal from the conditions of release, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976. See section 3145 of this title.

§ 3148. Sanctions for violation of a release condition

(a) Available sanctions.—A person who has been released pursuant to the provisions of section

3142, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

(b) Revocation of release.—The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of his release that he not commit a Federal, State, or local crime during the period of release shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

(1) finds that there is—

(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

(B) clear and convincing evidence that the person has violated any other condition of his release; and

(2) finds that—

(A) based on the factors set forth in section 3142(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, he shall treat the person in accordance with the provisions of section 3142 and may amend the conditions of release accordingly.

(c) Prosecution for contempt.—The judge may commence a prosecution for contempt, pursuant to the provisions of section 401, if the person has violated a condition of his release.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1983.)

Prior Provisions. A prior section 3148, added Pub.L 89–465, § 3(a), June 22, 1966, 80 Stat. 215, and amended Pub.L. 91–452, Title X, § 1002, Oct. 15, 1970, 84 Stat. 952, relating to release in capital cases and after conviction, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976. See section 3143 of this title.

§ 3149. Surrender of an offender by a surety

A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer. The judicial officer shall determine in accordance with the provisions of section 3148(b) whether to revoke the release of the person, and may absolve the surety of responsibility to pay all or part of the bond in accordance with the provisions of Rule 46 of the Federal Rules of Criminal Procedure. The person so committed shall be held in official detention until released pursuant to this chapter or another provision of law.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat.1984.)

Prior Provisions. A prior section 3149, added Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 216, providing for the release of material witnesses, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976. See section 3144 of this title.

§ 3150. Applicability to a case removed from a State court

The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.

(Added Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1984.)

Codification. Section 1410 of Pub.L. 98–473, Title II, ch. XIV, Oct. 12, 1984, 98 Stat. 2178, purported to delete "the general fund of" in subsec. (a) but was incapable of execution.

Prior Provisions. A prior section 3150, added Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 216, providing for penalties for failure to appear, was repealed by Pub.L. 98–473, Title II, c. 1, § 203(a), Oct. 12, 1984, 98 Stat. 1976. See section 3146 of this title.

[§§ 3150a, 3151. Repealed. Pub.L. 98–473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1976.]

Section 3150a added Pub.L. 97–258, § 2(d)(3)(B), Sept. 13, 1982, 96 Stat. 1058, related to refund of forfeited bail.

Section 3151, added Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 216, provided that nothing in this chapter should interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

§ 3152. Establishment of pretrial services

(a) On and after the date of the enactment of the Pretrial Services Act of 1982, the Director of the Administrative Office of the United States Courts (hereinafter in this chapter referred to as the "Director") shall, under the supervision and direction of the Judicial Conference of the United States, provide directly, or by contract or otherwise (to such extent and in such amounts as are provided in appropriation Acts), for the establishment of pretrial services in each judicial district (other than the District of Columbia). Pretrial services established under this section shall be supervised by a chief probation officer appointed under section 3654 of this title or by a chief pretrial services officer selected under subsection (c) of this section.

(b) Beginning eighteen months after the date of the enactment of the Pretrial Services Act of 1982, if an appropriate United States district court and the circuit judicial council jointly recommend the establishment under this subsection of pretrial services in a particular district, pretrial services shall be established under the general authority of the Administrative Office of the United States Courts.

(c) The pretrial services established under subsection (b) of this section shall be supervised by a chief pretrial services officer selected by a panel consisting of the chief judge of the circuit, the chief judge of the district, and a magistrate of the district or their designees. The chief pretrial services officer appointed under this subsection shall be an individual other than one serving under authority of section 3654 of this title.

(Added Pub.L. 93–619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2086, and amended Pub.L. 97–267, § 2, Sept. 27, 1982, 96 Stat. 1136.)

References in Text. The date of enactment of the Pretrial Services Act of 1982, referred to in subsecs. (a) and (b), is the date of enactment of Pub.L. 97–267, which was approved on Sept. 27, 1982.

Prior Provisions. A prior section 3152, as added by Pub.L. 89–465, § 3(a), June 22, 1966, 80 Stat. 216, defined the terms "judicial officer" and "offense", and was repealed by Pub.L. 93–619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2086. See section 3156 of this title.

Section 9 of Pub.L. 97–267 provided that:

"(a) There are authorized to be appropriated, for the fiscal year ending September 30, 1984, and each succeeding fiscal year thereafter, such sums as may be necessary to carry out the functions and powers of pretrial services established under section 3152(b) of title 18, United States Code [subsec. (b) of this section].

"(b) There are authorized to be appropriated for the fiscal year ending September 30, 1983, and the fiscal year ending September 30, 1984, such sums as may be necessary to carry out the functions and powers of the pretrial services agencies established under section 3152 of title 18 of the United States Code [this section] in effect before the date of enactment of this Act [Sept. 27, 1982]."

Status of Pretrial Services Agencies in Effect Prior to September 27, 1982. Section 8 of Pub.L. 97–267 provided that: "During the period beginning on the date of enactment of this Act [Sept. 27, 1982] and ending eighteen months after the date of the enactment of this Act, the pretrial services agencies established under section 3152 of title 18 of the United States Code [this section] in effect before the date of enactment of this Act [Sept. 27, 1982] may continue to operate, employ staff, provide pretrial services, and perform such functions and powers as are authorized under chapter 207 of title 18 of the United States Code [this chapter]."

§ 3153. Organization and administration of pretrial services

(a)(1) With the approval of the district court, the chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title shall appoint such other personnel as may be required. The position requirements and rate of compensation of the chief pretrial services officer and such other personnel shall be established by the Director with the approval of the Judicial Conference of the United States, except that no such rate of compensation shall exceed the rate of basic pay in effect and then payable for grade GS–16 of the General Schedule under section 5332 of title 5, United States Code.

(2) The chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title is authorized, subject to the general policy established by the Director and the approval of the district court, to procure temporary and intermittent services to the extent authorized by section 3109 of title 5, United States Code. The staff, other than clerical staff, may be drawn from law school students, graduate students, or such other available personnel.

(b) The chief probation officer in all districts in which pretrial services are established under section 3152(a) of this title shall designate personnel appointed under chapter 231 of this title to perform pretrial services under this chapter.

(c)(1) Except as provided in paragraph (2) of this subsection, information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of a bail determination and shall otherwise be confidential. Each pretrial services report shall be made available to the attorney for the accused and the attorney for the Government.

(2) The Director shall issue regulations establishing the policy for release of information made confidential by paragraph (1) of this subsection. Such regulations shall provide exceptions to the confidentiality requirements under paragraph (1) of

this subsection to allow access to such information—

(A) by qualified persons for purposes of research related to the administration of criminal justice;

(B) by persons under contract under section 3154(4) of this title;

(C) by probation officers for the purpose of compiling presentence reports;

(D) insofar as such information is a pretrial diversion report, to the attorney for the accused and the attorney for the Government; and

(E) in certain limited cases, to law enforcement agencies for law enforcement purposes.

(3) Information made confidential under paragraph (1) of this subsection is not admissible on the issue of guilt in a criminal judicial proceeding unless such proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failure to appear for the criminal judicial proceeding with respect to which pretrial services were provided.

(Added Pub.L. 93–619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2086, and amended Pub.L. 97–267, § 3, Sept. 27, 1982, 96 Stat. 1136.)

§ 3154. Functions and powers relating to pretrial services

Pretrial services functions shall include the following:

(1) Collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release.

(2) Review and modify the reports and recommendations specified in paragraph (1) of this section for persons seeking release pursuant to section 3145 of this chapter.

(3) Supervise persons released into its custody under this chapter.

(4) Operate or contract for the operation of appropriate facilities for the custody or care of persons released under this chapter including residential halfway houses, addict and alcoholic treatment centers, and counseling services.

(5) Inform the court and the United State attorney of all apparent violations of pretrial release conditions, arrests of persons released to the custody of providers of pretrial services or under the supervision of providers of pretrial services, and any danger that any such person may come to pose to any other person or the community, and recommend appropriate modifications of release conditions.

(6) Serve as coordinator for other local agencies which serve or are eligible to serve as custodians under this chapter and advise the court as to the eligibility, availability, and capacity of such agencies.

(7) Assist persons released under this chapter in securing any necessary employment, medical, legal, or social services.

(8) Prepare, in cooperation with the United States marshal and the United States attorney such pretrial detention reports as are required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial.

(9) Develop and implement a system to monitor and evaluate bail activities, provide information to judicial officers on the results of bail decisions, and prepare periodic reports to assist in the improvement of the bail process.

(10) To the extent provided for in an agreement between a chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title, or the chief probation officer in all other districts, and the United States attorney, collect, verify, and prepare reports for the United States attorney's office of information pertaining to the pretrial diversion of any individual who is or may be charged with an offense, and perform such other duties as may be required under any such agreement.

(11) Make contracts, to such extent and in such amounts as are provided in appropriation Acts, for the carrying out of any pretrial services functions.

(12) Perform such other functions as specified under this chapter.

(Added Pub.L. 93–619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2087, and amended Pub.L. 97–267, § 4, Sept. 27, 1982, 96 Stat. 1137; Pub.L. 98–437, Title II, § 203(b), Oct. 12, 1984, 98 Stat. 1984.)

Codification. Section 203(b)(1) of Pub.L 98–473, Title II, c. 1, Oct. 12, 1984, 98 Stat. 1984, which directed the substitution in subsec. (1) of "and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release" for "and recommend appropriate release conditions for each such person" was executed by inserting the substituted phrase for "and recommend appropriate release conditions for such individual" as the probable intent of Congress.

§ 3155. Annual reports

Each chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title, and each chief probation officer in all other districts, shall prepare an annual report to the chief judge of the district court and the Director concerning the administration and operation of pretrial services. The Director shall be required to include in the Director's annual report to the Judicial Conference under section 604 of title 28 a report on the administration and operation of the pretrial services for the previous year.

(Added Pub.L. 93-619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2088, and amended Pub.L. 97-267, § 5, Sept. 27, 1982, 96 Stat. 1138.)

§ 3156. Definitions

(a) As used in sections 3141-3150 of this chapter—

(1) The term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia;

(2) The term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress; and

(3) The term "felony" means an offense punishable by a maximum term of imprisonment of more than one year, and

(4) The term "crime of violence" means—

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(b) As used in sections 3152-3155 of this chapter—

(1) the term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

(Added Pub.L. 93-619, Title II, § 201, Jan. 3, 1975, 88 Stat. 2088, and amended Pub.L. 98-473, Title II, § 203(c), Oct. 12, 1984, 98 Stat. 1985.)

Amendment of Subsec. (b)(2)

Section 223(h) of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2029, provided that, effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473, subsec. (b)(2) of this section is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

CHAPTER 208—SPEEDY TRIAL

Sec.
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§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the con-

clusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076, and amended Pub.L. 96–43, §§ 2–5, Aug. 2, 1979, 93 Stat. 327, 328; Pub.L. 98–473, Title II, § 1219, Oct. 12, 1984, 98 Stat. 2167.)

Effective Date of 1984 Amendment. Amendment of section effective 30 days after Oct. 12, 1984, see section 1220 of Pub.L. 98–473 set out as a note under section 3505 of this title.

§ 3162. Sanctions

(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification

consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2079.)

§ 3163. Effective dates

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2080, and amended Pub.L. 96-43, § 6, Aug. 2, 1979, 93 Stat. 328.)

§ 3164. Persons detained or designated as being of high risk

(a) The trial or other disposition of cases involving—

(1) a detained person who is being held in detention solely because he is awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,

shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081, and amended Pub.L. 96-43, § 7, Aug. 2, 1979, 93 Stat. 329.)

§ 3165. District plans—generally

(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recom-

mendations of, the Federal Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in accordance with the schedule set forth in subsection (e) of this section.

(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

(e) (1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and fifth twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

(3) Not later than June 30, 1980, each United States district court with respect to which implementation has not been ordered under section 3174(c) shall prepare and submit a plan in accordance with subsections (a) through (d) to govern the trial or other disposition of offenses within the jurisdiction of such court during the sixth and subsequent twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c) in effect prior to the date of enactment of this paragraph.

(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents.

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2081, and amended Pub.L. 96–43, § 8, Aug. 2, 1979, 93 Stat. 329.)

References in Text. Effective dates of subsections 3161(b) and 3161(c), referred to in subsecs. (e)(1), (2), are set out in section 3163 of this title.

§ 3166. District plans—contents

(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

(4) the new timetable set, or requested to be set, for an extension;

(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the

Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications;

(8) the incidence of, and reasons for each thirty-day extention [1] under section 3161(b) with respect to an indictment in that district; and

(9) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in the district.

(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

(3) the number of matters transferred to other districts or to States for prosecution;

(4) the number of cases disposed of by trial and by plea;

(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition;

(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition; and

(7)(A) the number of new civil cases filed in the twelve-calendar-month period preceding the submission of the plan;

(B) the number of civil cases pending at the close of such period; and

(C) the increase or decrease in the number of civil cases pending at the close of such period, compared to the number pending at the close of the previous twelve-calendar-month period, and the length of time each such case has been pending.

(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

(f) Each plan may be accompanied by guidelines promulgated by the judicial council of the circuit for use by all district courts within that circuit to implement and secure compliance with this chapter.

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2082, and amended Pub.L. 96–43, § 9(a)–(c), Aug. 2, 1979, 93 Stat. 329.)

[1] So in original. Probably should be "extension".

§ 3167. Reports to Congress

(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts. Such reports shall also include the following:

(1) The reasons why, in those cases not in compliance with the time limits of subsections (b) and (c) of section 3161, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay.

(2) The category of offenses, the number of defendants, and the number of counts involved in those cases which are not meeting the time limits specified in subsections (b) and (c) of section 3161.

(3) The additional judicial resources which would be necessary in order to achieve compliance with the time limits specified in subsections (b) and (c) of section 3161.

(4) The nature of the remedial measures which have been employed to improve conditions and practices in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter.

(5) If a district has experienced difficulty in complying with this chapter, but an application for relief under section 3174 has not been made, the reason why such application has not been made.

(6) The impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the civil case calendar in each district as demonstrated by the information assembled and statistics compiled and submitted under sections 3166 and 3170.

(c) Not later than December 31, 1979, the Department of Justice shall prepare and submit to the Congress a report which sets forth the impact of the implementation of this chapter upon the office of the United States Attorney in each district and which shall also include—

(1) the reasons why, in those cases not in compliance, the provisions of section 3161(h) have not been adequate to accommodate reasonable periods of delay;

(2) the nature of the remedial measures which have been employed to improve conditions and practices in the offices of the United States Attorneys in those districts with low compliance experience under this chapter or to promote the adoption of practices and procedures which have been successful in those districts with high compliance experience under this chapter;

(3) the additional resources for the offices of the United States Attorneys which would be necessary to achieve compliance with the time limits of subsections (b) and (c) of section 3161;

(4) suggested changes in the guidelines or other rules implementing this chapter or statutory amendments which the Department of Justice deems necessary to further improve the administration of justice and meet the objectives of this chapter; and

(5) the impact of compliance with the time limits of subsections (b) and (c) of section 3161 upon the litigation of civil cases by the offices of the United States Attorneys and the rule changes, statutory amendments, and resources necessary to assure that such litigation is not prejudiced by full compliance with this chapter.

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083, and amended Pub.L. 96–43, § 9(e), Aug. 2, 1979, 93 Stat. 330.)

§ 3168. Planning process

(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district court, the Federal Public Defender, if any, two private attorneys, one with substantial experience in the defense of criminal cases in the district and one with substantial experience in civil litigation in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding other provisions of law he may be employed for any period of time during which his services are needed.

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2083, and amended Pub.L. 96–43, § 9(d), Aug. 2, 1979, 93 Stat. 330.)

§ 3169. Federal Judicial Center

The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter.

(Added Pub.L. 93–619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

§ 3170. Speedy trial data

(a) To facilitate the planning process, the implementation of the time limits, and continuous and permanent compliance with the objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics described in sections 3166(b) and (c) of this title. The

clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

(b) The clerk of each district court is authorized to obtain the information required by sections 3166(b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084, and amended Pub.L. 96-43, § 9(f), Aug. 2, 1979, 93 Stat. 331.)

§ 3171. Planning appropriations

(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2084.)

§ 3172. Definitions

As used in this chapter—

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085.)

Amendment of Par. (2)

Section 223(i) of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2029, provided that, effective Nov. 1, 1986, pursuant to scction 235 of Pub.L. 98-473, par. (2) of this section is amended by delcting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

§ 3173. Sixth amendment rights

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085.)

§ 3174. Judicial emergency and implementation

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

(c)(1) If, prior to July 1, 1980, the chief judge of any district concludes, with the concurrence of the

planning group convened in the district, that the district is prepared to implement the provisions of section 3162 in their entirety, he may apply to the judicial council of the circuit in which the district is located to implement such provisions. Such application shall show the degree of compliance in the district with the time limits set forth in subsections (b) and (c) of section 3161 during the twelve-calendar-month period preceding the date of such application and shall contain a proposed order and schedule for such implementation, which includes the date on which the provisions of section 3162 are to become effective in the district, the effect such implementation will have upon such district's practices and procedures, and provision for adequate notice to all interested parties.

(2) After review of any such application, the judicial council of the circuit shall enter an order implementing the provisions of section 3162 in their entirety in the district making application, or shall return such application to the chief judge of such district, together with an explanation setting forth such council's reasons for refusing to enter such order.

(d)(1) The approval of any application made pursuant to subsection (a) or (c) by a judicial council of a circuit shall be reported within ten days to the Director of the Administrative Office of the United States Courts, together with a copy of the application, a written report setting forth in sufficient detail the reasons for granting such application, and, in the case of an application made pursuant to subsection (a), a proposal for alleviating congestion in the district.

(2) The Director of the Administrative Office of the United States Courts shall not later than ten days after receipt transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress by Act of Congress. The limitation on granting a suspension made by this paragraph shall not apply with respect to any judicial district in which the prior suspension is in effect on the date of the enactment of the Speedy Trial Act Amendments Act of 1979.

(e) If the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2085, and amended Pub.L. 96-43, § 10, Aug. 2, 1979, 93 Stat. 331.)

References in Text. The date of the enactment of the Speedy Trial Act Amendments Act of 1979, referred to in subsec. (d)(2), means the date of enactment of Pub.L. 96-43, which was enacted Aug. 2, 1979.

CHAPTER 209—EXTRADITION

Sec.

3181. Scope and limitation of chapter.
3182. Fugitives from State or Territory to State, District or Territory.
3183. Fugitives from State, Territory or Possession into extraterritorial jurisdiction of United States.
3184. Fugitives from foreign country to United States.
3185. Fugitives from country under control of United States into the United States.
3186. Secretary of State to surrender fugitive.
3187. Provisional arrest and detention within extraterritorial jurisdiction.
3188. Time of commitment pending extradition.
3189. Place and character of hearing.
3190. Evidence on hearing.
3191. Witnesses for indigent fugitives.
3192. Protection of accused.
3193. Receiving agent's authority over offenders.
3194. Transportation of fugitive by receiving agent.
3195. Payment of fees and costs.

Extradition Treaties. For Extradition Treaties in force with respect to the United States, see Appendix IV set out following this title.

§ 3181. Scope and limitation of chapter

The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 658 (R.S. § 5274).

Minor changes were made in phraseology.

§ 3182. Fugitives from State or Territory to State, District or Territory

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and

secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

HISTORICAL AND REVISION NOTES

Based on title, 18 U.S.C., 1940 ed., § 662 (R.S. § 5278).

Last sentence as to costs and expenses to be paid by the demanding authority was incorporated in section 3195 of this title.

Word "District" was inserted twice to make section equally applicable to fugitives found in the District of Columbia.

"Thirty days" was substituted for "six months" since, in view of modern conditions, the smaller time is ample for the demanding authority to act.

Minor changes were made in phraseology.

§ 3183. Fugitives from State, Territory, or Possession into extraterritorial jurisdiction of United States

Whenever the executive authority of any State, Territory, District, or possession of the United States or the Panama Canal Zone, demands any American citizen or national as a fugitive from justice who has fled to a country in which the United States exercises extraterritorial jurisdiction, and produces a copy of an indictment found or an affidavit made before a magistrate of the demanding jurisdiction, charging the fugitive so demanded with having committed treason, felony, or other offense, certified as authentic by the Governor or chief magistrate of such demanding jurisdiction, or other person authorized to act, the officer or representative of the United States vested with judicial authority to whom the demand has been made shall cause such fugitive to be arrested and secured, and notify the executive authorities making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

If no such agent shall appear within three months from the time of the arrest, the prisoner may be discharged.

The agent who receives the fugitive into his custody shall be empowered to transport him to the jurisdiction from which he has fled.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 662c (Mar. 22, 1934, ch. 73, § 2, 48 Stat. 455).

Said section 662c was incorporated in this section and sections 752 and 3195 of this title.

Provision as to costs or expenses to be paid by the demanding authority were incorporated in section 3196 of this title.

Reference to the Philippine Islands was deleted as obsolete in view of the independence of the Commonwealth of the Phillippines [sic] effective July 4, 1946.

The attention of Congress is directed to the probability that this section may be of little, if any, possible use in view of present world conditions.

Minor changes were made in phraseology.

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(3), 82 Stat. 1115.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 651 (R.S. § 5270; June 6, 1900, ch. 793, 31 Stat. 656).

Minor changes of phraseology were made.

§ 3185. Fugitives from country under control of United States into the United States

Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who, having violated the criminal laws in force therein by the commission of any of the offenses enumerated below, departs or flees from justice therein to the United States, shall, when found therein, be liable to arrest and detention by the authorities of the

United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed.

(1) Murder and assault with intent to commit murder;

(2) Counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money;

(3) Counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same;

(4) Forgery or altering and uttering what is forged or altered;

(5) Embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries;

(6) Larceny or embezzlement of an amount not less than $100 in value;

(7) Robbery;

(8) Burglary, defined to be the breaking and entering by nighttime into the house of another person with intent to commit a felony therein;

(9) Breaking and entering the house or building of another, whether in the day or nighttime, with the intent to commit a felony therein;

(10) Entering, or breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein;

(11) Perjury or the subornation of perjury;

(12) Rape;

(13) Arson;

(14) Piracy by the law of nations;

(15) Murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government;

(16) Malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life.

This chapter, so far as applicable, shall govern proceedings authorized by this section. Such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

No return or surrender shall be made of any person charged with the commission of any offense of a political nature.

If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial.

(As amended May 24, 1949, c. 139, § 49, 63 Stat. 96.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 652 (R.S. § 5270; June 6, 1900, ch. 793, 31 Stat. 656).

Reference to territory of the United States and the District of Columbia was omitted as covered by definitive section 5 of this title.

Changes were made in phraseology and arrangement.

1949 ACT

This section [section 49] corrects typographical errors in section 3185 of title 18, U.S.C., by transferring to subdivision (3) the words, "indebtedness, bank notes, or other instruments of public", from subdivision (2) of such section where they had been erroneously included.

§ 3186. Secretary of State to surrender fugitive

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 653 (R.S. § 5272).

Changes were made in phraseology and surplusage was deleted.

§ 3187. Provisional arrest and detention within extraterritorial jurisdiction

The provisional arrest and detention of a fugitive, under sections 3042 and 3183 of this title, in advance of the presentation of formal proofs, may be obtained by telegraph upon the request of the authority competent to request the surrender of

such fugitive addressed to the authority competent to grant such surrender. Such request shall be accompanied by an express statement that a warrant for the fugitive's arrest has been issued within the jurisdiction of the authority making such request charging the fugitive with the commission of the crime for which his extradition is sought to be obtained.

No person shall be held in custody under telegraphic request by virtue of this section for more than ninety days.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 662d (Mar. 22, 1934, ch. 73, § 3, 48 Stat. 455).

Provision for expense to be borne by the demanding authority is incorporated in section 3195 of this title.

Changes were made in phraseology and arrangement.

§ 3188. Time of commitment pending extradition

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 654 (R.S. § 5273).

Changes in phraseology only were made.

§ 3189. Place and character of hearing

Hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 657 (Aug. 3, 1882, ch. 378, § 1, 22 Stat. 215).

First word "All" was omitted as unnecessary.

§ 3190. Evidence on hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 655 (R.S. § 5271; Aug. 3, 1882, ch. 378, § 5, 22 Stat. 216).

Unnecessary words were deleted.

§ 3191. Witnesses for indigent fugitives

On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or magistrate hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(3), 82 Stat. 1115.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 656 (Aug. 3, 1882, ch. 378, § 3, 22 Stat. 215).

Words "that similar" after "manner" were omitted as unnecessary.

§ 3192. Protection of accused

Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any offense of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the

militia thereof, as may be necessary for the safekeeping and protection of the accused.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 659 (R.S. § 5275).

Words "crimes or" before "offenses" were omitted as unnecessary.

§ 3193. Receiving agent's authority over offenders

A duly appointed agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 660 (R.S. § 5276).

Words "jurisdiction of the" were omitted in view of the definition of United States in section 5 of this title.

Minor changes only were made in phraseology.

EXECUTIVE ORDER NO. 11517

Mar. 19, 1970, 35 F.R. 4937

ISSUANCE AND SIGNATURE BY SECRETARY OF STATE OF WARRANTS APPOINTING AGENTS TO RETURN FUGITIVES FROM JUSTICE EXTRADITED TO UNITED STATES

WHEREAS the President of the United States, under section 3192 of Title 18, United States Code [section 3192 of this title], has been granted the power to take all necessary measures for the transportation, safekeeping and security against lawless violence of any person delivered by any foreign government to an agent of the United States for return to the United States for trial for any offense of which he is duly accused; and

WHEREAS fugitives from justice in the United States whose extradition from abroad has been requested by the Government of the United States and granted by a foreign government are to be returned in the custody of duly appointed agents in accordance with the provisions of section 3193 of Title 18, United States Code [this section]; and

WHEREAS such duly appointed agents under the provisions of the law mentioned above, being authorized to receive delivery of the fugitive in behalf of the United States and to convey him to the place of his trial, are given the powers of a marshal of the United States in the several districts of the United States through which it may be necessary for them to pass with such prisoner, so far as such power is requisite for the prisoner's safekeeping; and

WHEREAS such warrants serve as a certification to the foreign government delivering the fugitives to any other foreign country through which such agents may pass, and to authorities in the United States of the powers therein conferred upon the agents; and

WHEREAS it is desirable by delegation of functions heretofore performed by the President to simplify and thereby expedite the issuance of such warrants to agents in the interests of the prompt return of fugitives to the United States:

NOW, THEREFORE, by virtue of the authority vested in me by section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, it is ordered as follows:

Section 1. The Secretary of State is hereby designated and empowered to issue and sign all warrants appointing agents to receive, in behalf of the United States, the delivery in extradition by a foreign government of any person accused of a crime committed within the United States, and to convey such person to the place of his trial.

Sec. 2. Agents appointed in accordance with section 1 of this order shall have all the powers conferred in respect of such agents by applicable treaties of the United States and by section 3193 of Title 18, United States Code [this section], or by any other provisions of United States law.

Sec. 3. Executive Order No. 10347. April 18, 1952, as amended by Executive Order No. 11354, May 23, 1967, [set out as a note under section 42 of Title 4, Flag and Seal, Seat of Government, and the States], is further amended by deleting numbered paragraph 4 and renumbering paragraphs 5 and 6 as paragraphs 4 and 5, respectively.

RICHARD NIXON

§ 3194. Transportation of fugitive by receiving agent

Any agent appointed as provided in section 3182 of this title who receives the fugitive into his custody is empowered to transport him to the State or Territory from which he has fled.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 663 (R.S. § 5279).

Last sentence of said section 663, relating to rescue of such fugitive, was omitted as covered by section 752 of this title, the punishment provision of which is based on later statutes. (See reviser's note under that section.)

Minor changes were made in phraseology.

§ 3195. Payment of fees and costs

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate, shall be certified by the judge or magistrate before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropria-

tions to defray the expenses of the judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

(As amended Oct. 17, 1968, Pub.L. 90-578, Title III, § 301(a)(3), 82 Stat. 1115.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 662, 662c, 662d, 668 (R.S. § 5278; Aug. 3, 1882, ch. 378, § 4, 22 Stat. 216; June 28, 1902, ch. 1301, § 1, 32 Stat. 475; Mar. 22, 1934, ch. 73, §§ 2, 3, 48 Stat. 455).

First paragraph of this section consolidates provisions as to costs and expenses from said sections 662, 662c, and 662d.

Minor changes were made in phraseology and surplusage was omitted.

Remaining provisions of said sections 662, 662c, and 662d of title 18, U.S.C., 1940 ed., are incorporated in sections 752, 3182, 3183, and 3187 of this title.

The words "or the Department of Justice as the case may be" were added at the end of the second paragraph in conformity with the appropriation acts of recent years. See for example act July 5, 1946, ch. 541, title II, 60 Stat. 460.

CHAPTER 211—JURISDICTION AND VENUE

Sec.

3231. District courts.
3232. District of offense—Rule.
3233. Transfer within district—Rule.
3234. Change of venue to another district—Rule.
3235. Venue in capital cases.
3236. Murder or manslaughter.
3237. Offenses begun in one district and completed in another.
3238. Offenses not committed in any district.
[3239. Repealed.]
3240. Creation of new district or division.
3241. Jurisdiction of offenses under certain sections.
3242. Indians committing certain offenses; acts on reservations.
3243. Jurisdiction of State of Kansas over offenses committed by or against Indians on Indian reservations.
3244. Jurisdiction of proceedings relating to transferred offenders.

§ 3231. District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

HISTORICAL AND REVISION NOTES

Based on section 588d of title 12, U.S.C., 1940 ed., Banks and Banking; title 18, U.S.C., 1940 ed., §§ 546, 547 (Mar. 4, 1909, ch. 321, §§ 326, 340, 35 Stat. 1151, 1153; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; May 18, 1934, ch. 304, § 4, 48 Stat. 783).

This section was formed by combining sections 546 and 547 of title 18, U.S.C., 1940 ed., with section 588d of title 12, U.S.C., Banks and Banking, with no change of substance.

The language of said section 588d of title 12, U.S.C., 1940 ed., which related to bank robbery, or killing or kidnapping as an incident thereto (see section 2113, of this title), and which read "Jurisdiction over any offense defined by sections 588b and 588c of this title shall not be reserved exclusively to courts of the United States" was omitted as adequately covered by this section.

§ 3232. District of offense—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Proceedings to be in district and division in which offense committed, Rule 18.

§ 3233. Transfer within district—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Arraignment, plea, trial, sentence in district of more than one division, Rule 19.

References in Text. Rule 19, referred to in text, was abrogated.

§ 3234. Change of venue to another district—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Plea or disposal of case in district other than that in which defendant was arrested, Rule 20.

§ 3235. Venue in capital cases

The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

HISTORICAL AND REVISION NOTES

Based on section 101 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Mar. 3, 1911, ch. 231, § 40, 36 Stat. 1100).

§ 3236. Murder or manslaughter

In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed

which caused the death, without regard to the place where the death occurs.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 553 (Mar. 4, 1909, ch. 321, § 336, 35 Stat. 1152).

§ 3237. Offenses begun in one district and completed in another

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where venue for prosecution of an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in an other provision of law) is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

(As amended Aug. 6, 1958, Pub.L. 85–595, 72 Stat. 512; Nov. 2, 1966, Pub.L. 89–713, § 2, 80 Stat. 1108; July 18, 1984, Pub.L. 98–369, Title I, § 162, 98 Stat. 697; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1204(a), 98 Stat. 2152.)

HISTORICAL AND REVISION NOTES

Based on section 103 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Mar. 3, 1911, ch. 231, § 42, 36 Stat. 1100).

Section was completely rewritten to clarify legislative intent and in order to omit special venue provisions from many sections.

The phrase "committed in more than one district" may be comprehensive enough to include "begun in one district and completed in another", but the use of both expressions precludes any doubt as to legislative intent.

Rules 18–22 of the Federal Rules of Criminal Procedure are in accord with this section.

The last paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in United States v. Johnson, 1944, 65 S.Ct. 249, 89 L.Ed. 236, which turned on the absence of a special venue provision in the Dentures Act, section 1821 of this revision. The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts as in section 1073 of this revision.

§ 3238. Offenses not committed in any district

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

(As amended May 23, 1963, Pub.L. 88–27, 77 Stat. 48.)

HISTORICAL AND REVISION NOTES

Based on section 102 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Mar. 3, 1911, ch. 231, § 41, 36 Stat. 1100).

Words "begun or" were inserted to clarify scope of this section and section 3237 of this title.

This section is similar to section 219 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse, providing in part that unlawful issuance of passports may be prosecuted in the district where the offender may be arrested or in custody. Said provision is therefore omitted as covered by this section. The remaining provisions of said section 219 are incorporated in section 1541 of this title.

[§ 3239. Repealed. Pub.L. 98–473, Title II, § 1204(b), Oct. 12, 1984, 98 Stat. 2152].

Section, act June 25, 1948, c. 645, 62 Stat. 683, related to threatening communications.

§ 3240. Creation of new district or division

Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the

case to be removed to the new district or division for trial.

(As amended May 24, 1949, c. 139, § 50, 63 Stat. 96.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on section 121 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Mar. 3, 1911, ch. 231, § 59, 36 Stat. 1103).

Section 121 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, was divided into two sections. Only the portion relating to venue in civil cases was left in title 28, U.S.C., 1940 ed., Judicial Code and Judiciary.

Minor changes of phraseology were made.

1949 ACT

This section [section 50] strikes the second sentence of section 3240 of title 18, U.S.C., as unnecessary. Section "119" of title 28, U.S.C., referred to in such sentence, became section 1404 of title 28 upon its revision and enactment into positive law in 1948, but reference to the latter, in said section 3240 of title 18, U.S.C., is surplusage in view of rule 19 et seq. of the Federal Rules of Criminal Procedure and the remainder of such section 3240.

§ 3241. Jurisdiction of offenses under certain sections

The United States District Court for the Canal Zone and the District Court of the Virgin Islands shall have jurisdiction of offenses under the laws of the United States, not locally inapplicable, committed within the territorial jurisdiction of such courts, and jurisdiction, concurrently with the district courts of the United States, of offenses against the laws of the United States committed upon the high seas.

(As amended July 7, 1958, Pub.L. 85–508, § 12(i), 72 Stat. 348.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 39, 574; sections 23, 101, 1406 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions; section 39 of title 50, U.S.C., 1940 ed., War and National Defense (June 6, 1900, ch. 786, § 4, 31 Stat. 322; Aug. 24, 1912, ch. 387, § 3, 37 Stat. 512; June 15, 1917, ch. 30, title XIII, § 2, 40 Stat. 231; Mar. 2, 1921, ch. 110, 41 Stat. 1203; June 22, 1936, ch. 699, § 28, 49 Stat. 1814).

Section consolidates portions of sections 39 and 574 of title 18, U.S.C., 1940 ed., with jurisdictional provisions of sections 23, 101, and 1406 of title 48, U.S.C., 1940 ed., and section 39 of title 50 U.S.C., 1940 ed., with changes of phraseology necessary to effect consolidation.

The revised section simplifies and clarifies the Federal jurisdiction of the district courts of the Territories and Possessions. The enumeration of sections in section 574 of title 18, U.S.C., 1940 ed., was omitted as incomplete and misleading and the general language of the revised section was made applicable to the Canal Zone.

The phrase "the several courts of the first instance in the Philippine Islands" in section 574 of title 18, U.S.C., 1940 ed., was omitted as obsolete in view of the independence of the Commonwealth of the Philippines effective July 4, 1946.

The last sentence of section 574 of title 18, U.S.C., 1940 ed., with reference to the powers of district attorneys was omitted as unnecessary and otherwise covered by sections 403 and 404 of title 22, U.S.C., 1940 ed., Foreign Relations and Intercourse.

Definition of United States in section 39 of title 18, U.S.C., 1940 ed., is incorporated in section 5 of this title.

§ 3242. Indians committing certain offenses; acts on reservations

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

(As amended May 24, 1949, c. 139, § 51, 63 Stat. 96; Nov. 2, 1966, Pub.L. 89–707, § 2, 80 Stat. 1101; May 29, 1976, Pub.L. 94–297, § 4, 90 Stat. 586.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 548 (Mar. 4, 1909, ch. 321, § 328, 35 Stat. 1151; June 1932, ch. 284, 47 Stat. 337).

The provisions defining rape in accordance with the law of the State and prescribing imprisonment at the discretion of the court for rape by an Indian upon an Indian are now included in section 1153 of this title. (See also section 6 of this title.)

Section 549 of said title 18, relating to crimes in Indian reservations in South Dakota, was omitted as covered by section 1153 of this title. Accordingly the last sentence of said section 548, extending this section to prosecutions of Indians in South Dakota, was also omitted as unnecessary because this section is sufficient and applicable. Other provisions of said section 548 are incorporated in sections 1151 and 1153 of this title.

Minor changes were made in phraseology.

1949 ACT

This section [section 51] conforms section 3242 of title 18, U.S.C., with sections 1151 and 1153 of such title, thus eliminating inconsistency and ambiguity with respect to the definition of Indian country.

§ 3243. Jurisdiction of State of Kansas over offenses committed by or against Indians on Indian reservations

Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on

Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

HISTORICAL AND REVISION NOTES

Based on section 217a of title 25, U.S.C., 1940 ed., Indians (June 8, 1940, ch. 276, 54 Stat. 249).

The attention of Congress is directed to consideration of the question whether this section should be broadened and made applicable to all states rather than only to Kansas. Such change was not regarded as within the scope of this revision.

Changes were made in phraseology.

§ 3244. Jurisdiction of proceedings relating to transferred offenders

When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted offenders—

(1) the country in which the offender was convicted shall have exclusive jurisdiction and competence over proceedings seeking to challenge, modify, or set aside convictions or sentences handed down by a court of such country;

(2) all proceedings instituted by or on behalf of an offender transferred from the United States to a foreign country seeking to challenge, modify, or set aside the conviction or sentence upon which the transfer was based shall be brought in the court which would have jurisdiction and competence if the offender had not been transferred;

(3) all proceedings instituted by or on behalf of an offender transferred to the United States pertaining to the manner of execution in the United States of the sentence imposed by a foreign court shall be brought in the United States district court for the district in which the offender is confined or in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents. The Attorney General shall defend against such proceedings;

(4) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer from the United States shall be brought in the United States district court of the district in which the proceedings to determine the validity of the offender's consent were held and shall name the Attorney General as respondent; and

(5) all proceedings instituted by or on behalf of an offender seeking to challenge the validity or legality of the offender's transfer to the United States shall be brought in the United States district court of the district in which the offender is confined or of the district in which supervision is exercised and shall name the Attorney General and the official having immediate custody or exercising immediate supervision of the offender as respondents. The Attorney General shall defend against such proceedings.

(Added Pub.L. 95–144, § 3, Oct. 28, 1977, 91 Stat. 1220, Title 28, § 2256; renumbered Pub.L. 95–598, Title III, § 314(j)(1), Nov. 6, 1978, 92 Stat. 2677.)

CHAPTER 213—LIMITATIONS

Sec.
3281. Capital offenses.
3282. Offenses not capital.
3283. Customs and slave trade violations.
3284. Concealment of bankrupt's assets.
3285. Criminal contempt.
3286. Seduction on vessel of United States.
3287. Wartime suspension of limitations.
3288. Reindictment where defect found after period of limitations.[1]
3289. Reindictment where defect found before period of limitations.[1]
3290. Fugitives from justice.
3291. Nationality, citizenship and passports.
3292. Suspension of limitations to permit United States to obtain foreign evidence.

[1] Section catchline amended without amending analysis.

Effective Date of 1984 Amendment. Addition of item 3292 effective 30 days after Oct. 12, 1984, see section 1220 of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 2167, set out as a note under section 3505 of this title.

§ 3281. Capital offenses

An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 581a, 581b (Aug. 4, 1939, ch. 419, §§ 1, 2, 53 Stat. 1198).

Sections 581a and 581b of title 18, U.S.C., 1940 ed., were consolidated into this section without change of substance.

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five

years next after such offense shall have been committed.

(As amended Sept. 1, 1954, c. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub.L. 87-299, § 1, 75 Stat. 648.)

HISTORICAL AND REVISION NOTES

Based on section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, and on title 18, U.S.C., 1940 ed., § 582 (R.S. § 1044; Apr. 13, 1876, ch. 56, 19 Stat. 32; Nov. 17, 1921, ch. 124, § 1, 42 Stat. 220; Dec. 27, 1927, ch. 6, 45 Stat. 51; Oct. 14, 1940, ch. 876, title I, subchap. III, § 346(g), 54 Stat. 1167).

Section 582 of title 18, U.S.C., 1940 ed., and section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, were consolidated. "Except as otherwise expressly provided by law" was inserted to avoid enumeration of exceptive provisions.

The provision contained in the act of 1927 "That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information," was omitted as no longer necessary.

In the consolidation of these sections the 5-year period of limitation for violations of the Nationality Code, provided for in said section 746(g) of title 8, U.S.C., 1940 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner.

§ 3283. Customs and slave trade violations

No person shall be prosecuted, tried or punished for any violation of the customs laws or the slave trade laws of the United States unless the indictment is found or the information is instituted within five years next after the commission of the offense.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 584 (R.S. § 1046; July 5, 1884, ch. 225, § 2, 23 Stat. 122).

Words "customs laws" were substituted for "revenue laws," since different limitations are provided for internal revenue violations by section 3748 of title 26, U.S.C., 1940 ed., Internal Revenue Code.

This section was held to apply to offenses under the customs laws. Those offenses are within the term "revenue laws" but not within the term "internal revenue laws". *United States v. Hirsch* (1879, 100 U.S. 33, 25 L.Ed. 539), *United States v. Shorey* (1869, Fed.Cas. No. 16,282), and *United States v. Platt* (1840, Fed.Cas. No. 16,054a) applied this section in customs cases. Hence it appears that there was no proper basis for the complete elimination from section 584 of title 18, U.S.C., 1940 ed., of the reference to revenue laws.

Meaning of "revenue laws", *United States v. Norton* (1876, 91 U.S. 566, 23 L.Ed. 454), quoting Webster that "revenue" refers to "The income of a nation, derived from its taxes, duties, or other sources, for the payment of the national expenses." Quoting *United States v. Mayo* (1813, Fed.Cas. No. 15,755) that "revenue laws" meant such laws "as are made for the direct and avowed purpose of creating revenue or public funds for the service of the Government."

Definition of revenue. "Revenue" is the income of a State, and the revenue of the Post Office Department, being raised by a tax on mailable matter conveyed in the mail, and which is disbursed in the public service, is as much a part of the income of the government as moneys collected for duties on imports (*United States v. Bromley*, 53 U.S. 88, 99, 13 L.Ed. 905).

"Revenue" is the product or fruit of taxation. It matters not in what form the power of taxation may be exercised or to what subjects it may be applied, its exercise is intended to provide means for the support of the Government, and the means provided are necessarily to be regarded as the internal revenue. Duties upon imports are imposed for the same general object and, because they are so imposed, the money thus produced is considered revenue, not because it is derived from any particular source (*United States v. Wright*, 1870, Fed. Cas. No. 16,770).

"Revenue law" is defined as a law for direct object of imposing and collecting taxes, dues, imports, and excises for government and its purposes (*In re Mendenhall*, D.C.Mont.1935, 10 F.Supp. 122).

Act Cong. March 2, 1799, ch. 22, 1 Stat. 627, regulating the collection of duties on imports, is a revenue law, within the meaning of act Cong. April 18, 1818, ch. 70, 3 Stat. 433, providing for the mode of suing for and recovering penalties and forfeitures for violations of the revenue laws of the United States (*The Abigail*, 1824, Fed. Cas. No. 18).

Changes were made in phraseology.

§ 3284. Concealment of bankrupt's assets

The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

(As amended Nov. 6, 1978, Pub.L. 95-598, Title III, § 314(k), 92 Stat. 2678.)

HISTORICAL AND REVISION NOTES

Based on section 52(d) of title 11, U.S.C., 1940 ed., Bankruptcy (May 27, 1926, ch. 406, § 11d, 44 Stat. 665; June 22, 1938, ch. 575, § 1, 52 Stat. 856).

The 3-year-limitation provision was omitted as unnecessary in view of the general statute, section 3282 of this title.

The words "or a discharge denied" and "or denial of discharge" were added on the recommendation of the Department of Justice to supply an omission in existing law.

Other subsections of said section 52 of title 11, U.S.C., 1940 ed., are incorporated in sections 151–154 and 3057 of this title.

Other minor changes of phraseology were made.

§ 3285. Criminal contempt

No proceeding for criminal contempt within section 402 of this title shall be instituted against any person, corporation or association unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act.

Historical and Revision Notes

Based on section 390 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Oct. 15, 1914, ch. 323, § 25, 38 Stat. 740).

Word "criminal" was inserted before "contempt" in first line. Words "within section 402 of this title" were inserted after "contempt".

The correct meaning and narrow application of title 28, U.S.C., 1940 ed., § 390, are preserved, as section 389 of that title is incorporated in sections 402 and 3691 of this title.

Words "corporation or association" were inserted after "person", thus embodying applicable definition of section 390a of title 28, U.S.C., 1940 ed. (See reviser's note under section 402 of this title.)

§ 3286. Seduction on vessel of United States

No person shall be prosecuted, tried, or punished for seduction in violation of section 2198 of this title unless indictment is found or the information is filed within one year after the vessel on which the offense was committed arrives at its port of destination.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 460 (Mar. 4, 1909, ch. 321, § 281, 35 Stat. 1144).

Section 460 of title 18, U.S.C., 1940 ed., was incorporated in this section and sections 2198 and 3614 of this title. Minor changes in phraseology only were made in this section.

Reference to the filing of an information was inserted in view of rule 7 of the Federal Rules of Criminal Procedure.

§ 3287. Wartime suspension of limitations

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 590a (Aug. 24, 1942, ch. 555, § 1, 56 Stat. 747; July 1, 1944, ch. 358, § 19(b), 58 Stat. 667; Oct. 3, 1944, ch. 479, § 28, 58 Stat. 781).

The phrase "when the United States is at war" was inserted at the beginning of this section to make it permanent instead of temporary legislation, and to obviate the necessity of reenacting such legislation in the future. This permitted the elimination of references to dates and to the provision limiting the application of the section to transactions net yet fully barred. When the provisions of the War Contract Settlements Act of 1944, upon which this section is based, are considered in connection with said section 590a which it amends, it is obvious that no purpose can be served now by the provisions omitted.

Phrase (2), reading "or committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States" was derived from section 28 of the Surplus Property Act of 1944 which amended said section 590a of title 18, U.S.C., 1940 ed. This act is temporary by its terms and relates only to offenses committed in the disposition of surplus property thereunder.

The revised section extends its provisions to all offenses involving the disposition of any property, real or personal, of the United States. This extension is more apparent than real since phrase (2), added as the result of said Act, was merely a more specific statement of offenses embraced in phrase (1) of this section.

The revised section is written in general terms as permanent legislation applicable whenever the United States is at war. (See, also, reviser's note under section 284 of this title.)

The last paragraph was added to obviate any possibility of doubt as to meaning of terms defined in section 103 of title 41, U.S.C., 1940 ed., Public Contracts.

Changes were made in phraseology.

§ 3288. Indictment where defect found after period of limitations

Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period pre-

scribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

(As amended Oct. 16, 1963, Pub.L. 88–139, § 2, 77 Stat. 248; Aug. 30, 1964, Pub.L. 88–520, § 1, 78 Stat. 699.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 556a, 587, 589 (Apr. 30, 1934, ch. 170, § 1, 48 Stat. 648; May 10, 1934, ch. 278, §§ 1, 3, 48 Stat. 772; July 10, 1940, ch. 567, 54 Stat. 747).

This section is a consolidation of sections 556a, 587, and 589 of title 18, U.S.C., 1940 ed., without change of substance. (See reviser's note under section 3289 of this title.)

§ 3289. Indictment where defect found before period of limitations

Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire within six calendar months of the date of the dismissal of the indictment or information, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the expiration of the applicable statute of limitations, or, if no regular grand jury is in session in the appropriate jurisdiction at the expiration of the applicable statute of limitations, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

(As amended Oct. 16, 1963, Pub.L. 88–139, § 2, 77 Stat. 248; Aug. 30, 1964, Pub.L. 88–520, § 2, 78 Stat. 699.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 556a, 588, 589 (Apr. 30, 1934, ch. 170, § 1, 48 Stat. 648; May 10, 1934, ch. 278, §§ 2, 3, 48 Stat. 772).

Consolidation of sections 556a, 588, and 589 of title 18, U.S.C., 1940 ed., without change of substance. The provisions of said section 556a, with reference to time of filing motion, were omitted and numerous changes of phraseology were necessary to effect consolidation, particularly in view of rules 6(b) and 12(b)(2), (3)(5) of the Federal Rules of Criminal Procedure.

Words "regular or special" were omitted and "regular" inserted after "succeeding" to harmonize with section 3288 of this title.

§ 3290. Fugitives from justice

No statute of limitations shall extend to any person fleeing from justice.

HISTORICAL AND REVISION NOTES

Based on Title 18, U.S.C., 1940 ed., § 583 (R.S. § 1045).

Said section 583 was rephrased and made applicable to all statutes of limitation and is merely declaratory of the generally accepted rule of law.

§ 3291. Nationality, citizenship and passports

No person shall be prosecuted, tried, or punished for violation of any provision of sections 1423 to 1428, inclusive, of chapter 69 and sections 1541 to 1544, inclusive, of chapter 75 of title 18 of the United States Code, or for conspiracy to violate any of the afore-mentioned [1] sections, unless the indictment is found or the information is instituted within ten years after the commission of the offense.

(Added June 30, 1951, c. 194, § 1, 65 Stat. 107.)

[1] So in original.

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense—

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action

before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

(Added Pub.L. 98-473, Title II, § 1218(a), Oct. 12, 1984, 98 Stat. 2167.)

Effective Date. Section effective 30 days after Oct. 12, 1984, see section 1220 of Pub.L. 98-473 set out as a note under section 3505 of this title.

CHAPTER 215—GRAND JURY

Sec.
3321. Number of grand jurors; summoning additional jurors.
3322. Number; summoning—Rule.
3323. Objections and motions—Rule.
3324. Foreman and deputy; powers and duties; records —Rule.[1]
3325. Persons present at proceedings—Rule.
3326. Secrecy of proceedings and disclosure—Rule.
3327. Indictment; finding and return—Rule.
3328. Discharging jury and excusing juror—Rule.

[1] So in original. Catchline reads "deputies".

§ 3321. Number of grand jurors; summoning additional jurors

Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-three persons. If less than sixteen of the persons summoned attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. Whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.

HISTORICAL AND REVISION NOTES

Based on section 419 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Mar. 3, 1911, ch. 231, § 282, 36 Stat. 1165).

The provisions of the first sentence are embodied in rule 6(a) of the Federal Rules of Criminal Procedure, but it has been retained because of its relation to the remainder of the text which is not covered by said rule.

§ 3322. Number; summoning—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Summoning grand jury; number of grand jurors, Rule 6(a).

§ 3323. Objections and motions—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Challenging array of grand jurors or individual grand jurors; motions to dismiss, Rule 6(b).

§ 3324. Foreman and deputies; powers and duties; records—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Appointment of grand jury foreman and deputy foreman; oaths, affirmations and indictments; records of jurors concurring, Rule 6(c).

§ 3325. Persons present at proceedings—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Persons who may be present while grand jury is in session; exclusion while jury is deliberating or voting, Rule 6(d).

§ 3326. Secrecy of proceedings and disclosure—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disclosure of proceedings to government attorneys; disclosure by direction of court or permission of defendant; secrecy of indictment, Rule 6(e).

§ 3327. Indictment; finding and return—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Concurrence of twelve or more jurors in indictment; return of indictment to judge in open court, Rule 6(f).

§ 3328. Discharging jury and excusing juror—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Discharge of grand jury by court; limitation of service; excusing juror for cause, Rule 6(g).

CHAPTER 216—SPECIAL GRAND JURY

Sec.
3331. Summoning and term.
3332. Powers and duties.
3333. Reports.
3334. General provisions.

§ 3331. Summoning and term

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the

Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(Added Pub.L. 91–452, Title I, § 101(a), Oct. 15, 1970, 84 Stat. 923.)

§ 3332. Powers and duties

(a) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

(Added Pub.L. 91–452, Title I, § 101(a), Oct. 15, 1970, 84 Stat. 924.)

§ 3333. Reports

(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report—

(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(2) regarding organized crime conditions in the district.

(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (a) of section 3332 and is supported by the preponderance of the evidence; and

(2) when the report is submitted pursuant to paragraph (1) of subsection (a) of this section, each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman of the grand jury were afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (2) of subsection (a) of this section, it is not critical of an identified person.

(c) (1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record or be subject to subpena or otherwise made public (i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3)

of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.

(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously, or unnecessarily, such answer shall become an appendix to the report.

(3) Upon the expiration of the time set forth in paragraph (1) of subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.

(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpena or public inspection during the pendency of such criminal matter, except upon order of the court.

(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

(f) As used in this section, "public officer or employee" means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

(Added Pub.L. 91–452, Title I, § 101(a), Oct. 15, 1970, 84 Stat. 924.)

§ 3334. General provisions

The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter.

(Added Pub.L. 91–452, Title I, § 101(a), Oct. 15, 1970, 84 Stat. 926.)

CHAPTER 217—INDICTMENT AND INFORMATION

Sec.

3361. Form and contents—Rule.
3362. Waiver of indictment and prosecution on information—Rule.
3363. Joinder of offenses—Rule.
3364. Joinder of defendants—Rule.
3365. Amendment of information—Rule.
3366. Bill of particulars—Rule.
3367. Dismissal—Rule.

§ 3361. Form and contents—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Contents and form; striking surplusage, Rule 7(a), (c), (d).

§ 3362. Waiver of indictment and prosecution on information—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Waiver of indictment for offenses not punishable by death, Rule 7(b).

§ 3363. Joinder of offenses—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Joinder of two or more offenses in same indictment, Rule 8(a).

Trial together of indictments or informations, Rule 13.

§ 3364. Joinder of defendants—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Joinder of two or more defendants charged in same indictment, Rule 8(b).

Relief from prejudicial joinder, Rule 14.

§ 3365. Amendment of information—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Amendment of information, time and conditions, Rule 7(e).

§ 3366. Bill of particulars—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Bill of particulars for cause; motion after arraignment; time; amendment, Rule 7(f).

§ 3367. Dismissal—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Dismissal filed by Attorney General or United States Attorney, Rule 48.

Dismissal on objection to array of grand jury or lack of legal qualification of individual grand juror, Rule 6(b)(2).

CHAPTER 219—TRIAL BY UNITED STATES MAGISTRATES

Sec.

3401. Misdemeanors; application of probation laws.
3402. Rules of procedure, practice and appeal.

§ 3401. Misdemeanors; application of probation laws

(a) When specially designated to exercise such jurisdiction by the district court or courts he serves, any United States magistrate shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within that judicial district.

(b) Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgment, and sentencing by a judge of the district court.

(c) A magistrate who exercises trial jurisdiction under this section, and before whom a person is convicted or pleads either guilty or nolo contendere, may, with the approval of a judge of the district court, direct the probation service of the court to conduct a presentence investigation on that person and render a report to the magistrate prior to the imposition of sentence.

(d) The probation laws shall be applicable to persons tried by a magistrate under this section, and such officer shall have power to grant probation and to revoke or reinstate the probation of any person granted probation by him.

(e) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. For purposes of appeal a copy of the record of such proceedings shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(f) The district court may order that proceedings in any misdemeanor case be conducted before a district judge rather than a United States magistrate upon the court's own motion or, for good cause shown, upon petition by the attorney for the Government. Such petition should note the novelty, importance, or complexity of the case, or other pertinent factors, and be filed in accordance with regulations promulgated by the Attorney General.

(g) The magistrate may, in a case involving a youth offender in which consent to trial before a magistrate has been filed under subsection (b) of this section, impose sentence and exercise the other powers granted to the district court under chapter 402 and section 4216 of this title, except that—

(1) the magistrate may not sentence the youth offender to the custody of the Attorney General pursuant to such chapter for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense;

(2) such youth offender shall be released conditionally under supervision no later than 3 months before the expiration of the term imposed by the magistrate, and shall be discharged unconditionally on or before the expiration of the maximum sentence imposed; and

(3) the magistrate may not suspend the imposition of sentence and place the youth offender on probation for a period in excess of 1 year for conviction of a misdemeanor or 6 months for conviction of a petty offense.

(h) The magistrate may, in a petty offense case involving a juvenile in which consent to trial before a magistrate has been filed under subsection (b) of this section, exercise all powers granted to the district court under chapter 403 of this title. For purposes of this subsection, proceedings under chapter 403 of this title may be instituted against a juvenile by a violation notice or complaint, except that no such case may proceed unless the certification referred to in section 5032 of this title has been filed in open court at the arraignment. No term of imprisonment shall be imposed by the magistrate in any such case.

(As amended July 7, 1958, Pub.L. 85–508, § 12(j), 72 Stat. 348; Oct. 17, 1968, Pub.L. 90–578, Title III, § 302(a), 82 Stat. 1115; Oct. 10, 1979, Pub.L. 96–82, § 7(a), (b), 93 Stat. 645, 646.)

Amendment of Subsecs. (g) and (h)

Section 223(j) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2029, provided that, effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473, this section is amended by repealing subsection (g) and redesignating (h) to (g) and, in subsection (h), by deleting "petty offense case" and substituting "Class B or C misdemeanor case, or infraction case,".

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 576, 576b, 576c, 576d (Oct. 9, 1940, ch. 785, §§ 1, 3–5, 54 Stat. 1058, 1059).

The phrase "the commissioner shall have power to grant probation" was inserted in paragraph (c) in order to make clear the authority of the commissioner to grant probation without application to the District judge.

Four sections were consolidated herein with minor rearrangements and deletion of unnecessary words.

References in Text. Chapter 402, referred to in subsec. (g), was repealed by Pub.L. 98–473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027, effective Oct. 12, 1984, pursuant to section 235(a)(1)(A) of Pub.L. 98–473, set out as an Effective Date note under section 3551 of this title, with sections 5017 to 5020 thereof subject to remain in effect as provided in section 235(b) of Pub.L. 98–473, set out as a Savings Provision note under section 3551 of this title.

§ 3402. Rules of procedure, practice and appeal

In all cases of conviction by a United States magistrate an appeal of right shall lie from the judgment of the magistrate to a judge of the district court of the district in which the offense was committed.

The Supreme Court shall prescribe rules of procedure and practice for the trial of cases before magistrates and for taking and hearing of appeals to the judges of the district courts of the United States.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 302(b), 82 Stat. 1116.)

HISTORICAL AND REVISION NOTES

Based on title 18 U.S.C., 1940 ed., § 576a (Oct. 9, 1940, ch. 685, § 2, 54 Stat. 1059).

CHAPTER 221—ARRAIGNMENT, PLEAS AND TRIAL

Sec.

3431. Term of court; power of court unaffected by expiration—Rule.
3432. Indictment and list of jurors and witnesses for prisoner in capital cases.
3433. Arraignment—Rule.
3434. Presence of defendant—Rule.
3435. Receiver of stolen property triable before or after principal.
3436. Consolidation of indictments or informations—Rule.
3437. Severance—Rule.
3438. Pleas—Rule.
3439. Demurrers and special pleas in bar or abatement abolished; relief on motion—Rule.
3440. Defenses and objections determined on motion—Rule.
3441. Jury; number of jurors; waiver—Rule.
3442. Jurors, examination, peremptory challenges; alternates—Rule.
3443. Instructions to jury—Rule.
3444. Disability of judge—Rule.
3445. Motion for judgment of acquittal—Rule.
3446. New trial—Rule.

§ 3431. Term of court; power of court unaffected by expiration—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Expiration of term without significance in criminal cases, Rule 45(c).

References in Text. Rule 45(c), referred to in text, was abrogated.

§ 3432. Indictment and list of jurors and witnesses for prisoner in capital cases

A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 562 (R.S. § 1033).

Words "or other capital offense" inserted after "treason" and "jurors" substituted for "jury". The concluding sentence "When any person is indicated for any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial" was omitted. The change made by the revisers, permitting an additional day's preparation for trial in homicide, kidnapping, rape, and other capital cases seemed not unreasonable.

Words "shall be delivered to him", at end of section, were omitted as unnecessary.

Rule 10 of the Federal Rules of Criminal Procedure requires that the defendant in every case be given a copy of the indictment or information before he is called upon to plead. Thus there is no conflict between the rule and the revised section.

Minor changes in phraseology were made.

§ 3433. Arraignment—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Reading and furnishing copy of indictment to accused, Rule 10.

§ 3434. Presence of defendant—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Right of defendant to be present generally; corporation; waiver, Rule 43.

§ 3435. Receiver of stolen property triable before or after principal

A person charged with receiving or concealing stolen property may be tried either before or after the trial of the principal offender.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 101, 467 (Mar. 4, 1909, ch. 321, §§ 48, 288, 35 Stat. 1098, 1145).

Other provisions of sections 101 and 467 of title 18, U.S.C., 1940 ed., were incorporated in sections 641 and 662 of this title.

Necessary changes were made in phraseology.

§ 3436. Consolidation of indictments or informations—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Two or more indictments or informations triable together, Rule 13.

§ 3437. Severance—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Relief from prejudicial joinder of defendants or offenses, Rule 14.

§ 3438. Pleas—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Plea of guilty, not guilty, or nolo contendere; acceptance by court; refusal to plead; corporation failing to appear, Rule 11.

Withdrawal of plea of guilty, Rule 32.

§ 3439. Demurrers and special pleas in bar or abatement abolished; relief on motion—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Motion to dismiss or for appropriate relief substituted for demurrer or dilatory plea or motion to quash, Rule 12.

§ 3440. Defenses and objections determined on motion—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Defenses or objections which may or must be raised before trial; time; hearing; effect of determination; limitations by law unaffected, Rule 12(b).

§ 3441. Jury; number of jurors; waiver—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Jury trial, waiver, twelve jurors or less by written stipulation, trial by court on general or special findings, Rule 23.

§ 3442. Jurors, examination, peremptory challenges; alternates—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Examination and peremptory challenges of trial jurors; alternate jurors, Rule 24.

§ 3443. Instructions to jury—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Court's instructions to jury, written requests and copies, objections, Rule 30.

§ 3444. Disability of judge—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disability of judge after verdict or finding of guilt, Rule 25.

§ 3445. Motion for judgment of acquittal—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Motions for directed verdict abolished.

Motions for judgment of acquittal adopted; court may reserve decision; renewal, Rule 29.

§ 3446. New trial—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Granting of new trial, grounds, and motion, Rule 33.

CHAPTER 223—WITNESSES AND EVIDENCE

Sec.
3481. Competency of accused.
3482. Evidence and witnesses—Rule.
3483. Indigent defendants, process to produce evidence—Rule.
3484. Subpoenas—Rule.
3485. Expert witnesses—Rule.
[3486. Repealed.]
3487. Refusal to pay as evidence of embezzlement.
3488. Intoxicating liquor in Indian country as evidence of unlawful introduction.
3489. Discovery and inspection—Rule.
3490. Official record or entry—Rule.
3491. Foreign documents.
3492. Commission to consular officers to authenticate foreign documents.
3493. Deposition to authenticate foreign documents.
3494. Certification of genuineness of foreign document.
3495. Fees and expenses of consuls, counsel, interpreters and witnesses.
3496. Regulations by President as to commissions, fees of witnesses, counsel and interpreters.

Sec.
3497. Account as evidence of embezzlement.
3498. Depositions—Rule.
3499. Contempt of court by witness—Rule.
3500. Demands for production of statements and reports of witnesses.
3501. Admissibility of confessions.
3502. Admissibility in evidence of eye witness testimony.
3503. Depositions to preserve testimony.
3504. Litigation concerning sources of evidence.
3505. Foreign records of regularly conducted activity.
3506. Service of papers filed in opposition to official request by United States to foreign government for criminal evidence.
3507. Special master at foreign deposition.

Effective Date of 1984 Amendment. Addition of items 3505 to 3507 effective 30 days after Oct. 12, 1984, see section 1220 of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 2167, set out as a note under section 3505 of this title.

Protected Facilities for Housing Government Witnesses. Pub.L. 91–452, Title V, §§ 501–504, Oct. 15, 1970, 84 Stat. 933, which authorized the Attorney General to provide security and housing for Government witnesses, potential Government witnesses, and their families in proceedings against organized crime, was repealed by Pub.L. 98–473, Title II, c. XII, Part F, Subpart A, § 1209(b), Oct. 12, 1984, 98 Stat. 2163 effective Oct. 1, 1984, pursuant to section 1210 of Pub.L. 98–473.

§ 3481. Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

HISTORICAL AND REVISION NOTES

Based on section 632 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, and section 1200, Art. 42(a), of Title 34, Navy (Mar. 16, 1878, ch. 37, 20 Stat. 30).

Section was rewritten without change of substance.

§ 3482. Evidence and witnesses—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Competency and privileges of witnesses and admissibility of evidence governed by principles of common law, Rule 26.

References in Text. Rule 26, referred to in text, has been amended and some provisions originally contained therein are now covered by the Federal Rules of Evidence, this pamphlet.

§ 3483. Indigent defendants, process to produce evidence—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Subpoena for indigent defendants, motion, affidavit, costs, Rule 17(b).

§ 3484. Subpoenas—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).
Service in United States, Rule 17(d), (e, 1).
Service in foreign country, Rule 17(d), (e, 2).
Indigent defendants, Rule 17(b).
On taking depositions, Rule 17(f).
Papers and documents, Rule 17(c).
Disobedience of subpoena as contempt of court, Rule 17(g).

§ 3485. Expert witnesses—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Selection and appointment of expert witnesses by court or parties; compensation, Rule 28.

References in Text. Rule 28, referred to in text, has been amended and some provisions originally contained therein are now covered by the Federal Rules of Evidence, this pamphlet.

[§ 3486. Repealed. Pub.L. 91–452, Title II, § 228(a), Oct. 15, 1970, 84 Stat. 930]

§ 3487. Refusal to pay as evidence of embezzlement

The refusal of any person, whether in or out of office, charged with the safe-keeping, transfer, or disbursement of the public money to pay any draft, order, or warrant, drawn upon him by the General Accounting Office, for any public money in his hands belonging to the United States, no matter in what capacity the same may have been received, or may be held, or to transfer or disburse any such money, promptly, upon the legal requirement of any authorized officer, shall be deemed, upon the trial of any indictment against such person for embezzlement, prima facie evidence of such embezzlement.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 180 (Mar. 4, 1909, ch. 321, § 94, 35 Stat. 1106; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

"General Accounting Office" was substituted for "proper accounting officer of the Treasury".

§ 3488. Intoxicating liquor in Indian country as evidence of unlawful introduction

The possession by a person of intoxicating liquors in Indian country where the introduction is

prohibited by treaty or Federal statute shall be prima facie evidence of unlawful introduction.

HISTORICAL AND REVISION NOTES

Based on section 245 of title 25, U.S.C., 1940 ed., Indians (May 18, 1916, ch. 125, § 1, 39 Stat. 124).

The only change made was the insertion of the word "Indian" before "country", to substitute specificity for generality. (See definition of "Indian country" in section 1151 of this title.)

§ 3489. Discovery and inspection—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Inspection of documents and papers taken from defendant, Rule 16.

§ 3490. Official record or entry—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Proof of official record or entry as in civil actions, Rule 27.

§ 3491. Foreign documents

Any book, paper, statement, record, account, writing, or other document, or any portion thereof, of whatever character and in whatever form, as well as any copy thereof equally with the original, which is not in the United States shall, when duly certified as provided in section 3494 of this title, be admissible in evidence in any criminal action or proceeding in any court of the United States if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under section 3492 of this title, that such document (or the original thereof in case such document is a copy) satisfies the authentication requirements of the Federal Rules of Evidence, unless in the event that the genuineness of such document is denied, any party to such criminal action or proceeding making such denial shall establish to the satisfaction of the court that such document is not genuine. Nothing contained herein shall be deemed to require authentication under the provisions of section 3494 of this title of any such foreign documents which may otherwise be properly authenticated by law.

(As amended May 24, 1949, c. 139, § 52, 63 Stat. 96; Oct. 3, 1964, Pub.L. 88-619, § 2, 78 Stat. 995; Dec. 12, 1975, Pub.L. 94-149, § 3, 89 Stat. 806.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 695a of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (June 20, 1936, ch. 640, § 2, 49 Stat. 1562.)

1949 ACT

This section [section 52] corrects section 3491 of title 18, U.S.C., so that the references therein will be to the correct section numbers in title 28, U.S.C., as revised and enacted in 1948.

References in Text. The Federal Rules of Evidence, referred to in text, are set out in this pamphlet.

§ 3492. Commission to consular officers to authenticate foreign documents

(a) The testimony of any witness in a foreign country may be taken either on oral or written interrogatories, or on interrogatories partly oral and partly written, pursuant to a commission issued, as hereinafter provided, for the purpose of determining whether any foreign documents sought to be used in any criminal action or proceeding in any court of the United States are genuine, and whether the authentication requirements of the Federal Rules of Evidence are satisfied with respect to any such document (or the original thereof in case such document is a copy). Application for the issuance of a commission for such purpose may be made to the court in which such action or proceeding is pending by the United States or any other party thereto, after five days' notice in writing by the applicant party, or his attorney, to the opposite party, or his attorney of record, which notice shall state the names and addresses of witnesses whose testimony is to be taken and the time when it is desired to take such testimony. In granting such application the court shall issue a commission for the purpose of taking the testimony sought by the applicant addressed to any consular officer of the United States conveniently located for the purpose. In cases of testimony taken on oral or partly oral interrogatories, the court shall make provisions in the commission for the selection as hereinafter provided of foreign counsel to represent each party (except the United States) to the criminal action or proceeding in which the foreign documents in question are to be used, unless such party has, prior to the issuance of the commission, notified the court that he does not desire the selection of foreign counsel to represent him at the time of taking of such testimony. In cases of testimony taken on written interrogatories, such provision shall be made only upon the request of any such party prior to the issuance of such commission. Selection of foreign counsel shall be made by the party whom such foreign counsel is to represent within ten days prior to the taking of testimony or by the court from which the commission issued, upon the request of such party made within such time.

(b) Any consular officer to whom a commission is addressed to take testimony, who is interested in the outcome of the criminal action or proceeding in

which the foreign documents in question are to be used or has participated in the prosecution of such action or proceeding, whether by investigations, preparation of evidence, or otherwise, may be disqualified on his own motion or on that of the United States or any other party to such criminal action or proceeding made to the court from which the commission issued at any time prior to the execution thereof. If after notice and hearing, the court grants the motion, it shall instruct the consular officer thus disqualified to send the commission to any other consular officer of the United States named by the court, and such other officer shall execute the commission according to its terms and shall for all purposes be deemed the officer to whom the commission is addressed.

(c) The provisions of this section and sections 3493–3496 of this title applicable to consular officers shall be applicable to diplomatic officers pursuant to such regulations as may be prescribed by the President.

(As amended May 24, 1949, c. 139, § 53, 63 Stat. 96; Dec. 12, 1975, Pub.L. 94–149, § 4, 89 Stat. 806.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on section 695b of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (June 20, 1936, ch. 640, § 3, 49 Stat. 1562).

1949 ACT

This section [section 53] corrects section 3492(a) of title 18, U.S.C., so that the reference in the first sentence thereof will be to the correct section number in title 28, U.S.C., as revised and enacted in 1948.

References in Text. The Federal Rules of Evidence, referred to in subsec. (a), are set out in this pamphlet.

§ 3493. Deposition to authenticate foreign documents

The consular officer to whom any commission authorized under section 3492 of this title is addressed shall take testimony in accordance with its terms. Every person whose testimony is taken shall be cautioned and sworn to testify the whole truth and carefully examined. His testimony shall be reduced to writing or typewriting by the consular officer taking the testimony, or by some person under his personal supervision, or by the witness himself, in the presence of the consular officer and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the witness. Every foreign document, with respect to which testimony is taken, shall be annexed to such testimony and subscribed by each witness who appears for the purpose of establishing the genuineness of such document. When counsel for all the parties attend the examination of any witness whose testimony is to be taken on written interrogatories, they may consent that oral interrogatories in addition to those accompanying the commission may be put to the witness. The consular officer taking any testimony shall require an interpreter to be present when his services are needed or are requested by any party or his attorney.

HISTORICAL AND REVISION NOTES

Based on section 695c of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (June 20, 1936, ch. 640, § 4, 49 Stat. 1563).

§ 3494. Certification of genuineness of foreign document

If the consular officer executing any commission authorized under section 3492 of this title shall be satisfied, upon all the testimony taken, that a foreign document is genuine, he shall certify such document to be genuine under the seal of his office. Such certification shall include a statement that he is not subject to disqualification under the provisions of section 3492 of this title. He shall thereupon transmit, by mail, such foreign documents, together with the record of all testimony taken and the commission which has been executed, to the clerk of the court from which such commission issued, in the manner in which his official dispatches are transmitted to the Government. The clerk receiving any executed commission shall open it and shall make any foreign documents and record of testimony, transmitted with such commission, available for inspection by the parties to the criminal action or proceeding in which such documents are to be used, and said parties shall be furnished copies of such documents free of charge.

HISTORICAL AND REVISION NOTES

Based on section 695d of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (June 20, 1936, ch. 640, § 5, 49 Stat. 1563).

§ 3495. Fees and expenses of consuls, counsel, interpreters and witnesses

(a) The consular fees prescribed under section 1201 of Title 22, for official services in connection with the taking of testimony under sections 3492–3494 of this title, and the fees of any witness whose testimony is taken shall be paid by the party who applied for the commission pursuant to which such testimony was taken. Every witness under section 3493 of this title shall be entitled to receive, for each day's attendance, fees prescribed under section 3496 of this title. Every foreign counsel

selected pursuant to a commission issued on application of the United States, and every interpreter whose services are required by a consular officer under section 3493 of this title, shall be paid by the United States, such compensation, together with such personal and incidental expense upon verified statements filed with the consular officer, as he may allow. Compensation and expenses of foreign counsel selected pursuant to a commission issued on application of any party other than the United States shall be paid by the party whom such counsel represents and shall be allowed in the same manner.

(b) Whenever any party makes affidavit, prior to the issuance of a commission for the purpose of taking testimony, that he is not possessed of sufficient means and is actually unable to pay any fees and costs incurred under this section, such fees and costs shall, upon order of the court, be paid in the same manner as fees and costs are paid which are chargeable to the United States.

(c) Any appropriation available for the payment of fees and costs in the case of witnesses subpenaed in behalf of the United States in criminal cases shall be available for any fees or costs which the United States is required to pay under this section.

(As amended May 24, 1949, c. 139, § 54, 63 Stat. 96.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on section 695f of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (June 20, 1936, ch. 640, § 7, 49 Stat. 1564).

1949 ACT

This section [section 54] corrects the reference in the first sentence of section 3495(a) of title 18, U.S.C., because the provisions which were formerly set out as section 127 of title 22, U.S.C., are now set out as section 1201 of such title.

§ 3496. Regulations by President as to commissions, fees of witnesses, counsel and interpreters

The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular officers under the provisions of sections 3492–3494 of this title and schedules of fees allowable to witnesses, foreign counsel, and interpreters under section 3495 of this title.

HISTORICAL AND REVISION NOTES

Based on section 695g of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (June 20, 1936, ch. 640, § 8, 49 Stat. 1564).

Executive Order No. 10307

Nov. 26, 1951, 16 F.R. 11907

DELEGATION OF AUTHORITY

By virtue of the authority vested in me by the act of August 8, 1950, 64 Stat. 419 (3 U.S.C.Supp. 301–303), I hereby delegate to the Secretary of State (1) the authority vested in the President by section 3496 of title 18 of the United States Code (62 Stat. 836) [this section] to prescribed regulations governing the manner of executing and returning commissions by consular officers under the provisions of section 3492–3494 of the said title, and schedules of fees allowable to witnesses, foreign counsel, and interpreters under section 3495 of the said title, and (2) the authority vested in the President by section 3492(c) of title 18 of the United States Code (62 Stat. 835) to prescribe regulations making the provisions of sections 3492–3496 of the said title applicable to diplomatic officers.

Executive Order No. 8298 of December 4, 1939, entitled "Regulations Governing the Manner of Executing and Returning Commissions by Officers of the Foreign Service in Criminal Cases, and Schedule of Fees and Compensation in Such Cases", is hereby revoked.

§ 3497. Account as evidence of embezzlement

Upon the trial of any indictment against any person for embezzling public money it shall be sufficient evidence, prima facie, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the General Accounting Office.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 179, 355; section 668 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (R.S. § 887; Mar. 4, 1909, ch. 321, §§ 93, 225, 35 Stat. 1105, 1133; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

This section is a consolidation of section 179 of title 18, U.S.C., 1940 ed., with similar provisions of section 355 of title 18, U.S.C., 1940 ed., and section 668 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, with changes of phraseology only except that "General Accounting Office" was substituted for "Treasury Department".

Other provisions of said section 355 of title 18, U.S.C., 1940 ed., are incorporated in section 1711 of this title.

Words in second sentence of said section 355 of title 18, U.S.C., 1940 ed., which preceded the semicolon therein and which read "Any failure to produce or to pay over any such money or property, when required so to do as above provided, shall be taken to be prima facie evidence of such embezzlement" were omitted as surplusage, because such failure to produce or to pay over such money or property constitutes embezzlement. (See sections 653 and 1711 of this title.)

§ 3498. Depositions—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Time, manner and conditions of taking depositions; costs; notice; use; objections; written interrogatories, Rule 15.

Subpoenas on taking depositions, Rule 17(f).

§ 3499. Contempt of court by witness—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disobedience of subpoena without excuse as contempt, Rule 17(g).

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

(Added Pub.L. 85–269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91–452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.)

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was

charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

(Added Pub.L. 90–351, Title II, § 701(a), June 19, 1968, 82 Stat. 210, and amended Pub.L. 90–578, Title III, § 301(a)(3), Oct. 17, 1968, 82 Stat. 1115.)

§ 3502. Admissibility in evidence of eye witness testimony

The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

(Added Pub.L. 90–351, Title II, § 701(a), June 19, 1968, 82 Stat. 211.)

§ 3503. Depositions to preserve testimony

(a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness. A motion by the Government to obtain an order under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.

(b) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination, but his failure, absent good cause shown, to appear after notice and tender of expenses shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) If a defendant is without counsel, the court shall advise him of his rights and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel of his own choice. Whenever a deposition is taken at the instance of the Government, or whenever a deposition is taken at the instance of a defendant who appears to be unable to bear the expense of the taking of the deposition, the court may direct

that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the Government. In such event the marshal shall make payment accordingly.

(d) A deposition shall be taken and filed in the manner provided in civil actions, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope of examination and cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the defendant the court may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. Such request shall constitute a waiver of any objection to the taking and use of the deposition based upon its being so taken.

(e) The Government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the Government and which the Government would be required to make available to the defendant if the witness were testifying at the trial.

(f) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered; or that the party offering the deposition has been unable to procure the attendance of the witness by subpena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(g) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(Added Pub.L. 91–452, Title VI, § 601(a), Oct. 15, 1970, 84 Stat. 934.)

§ 3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

(Added Pub.L. 91–452, Title VII, § 702(a), Oct. 15, 1970, 84 Stat. 935.)

§ 3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written

notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term—

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(Added Pub.L. 98–473, Title II, § 1217(a), Oct. 12, 1984, 98 Stat. 2165.)

Effective Date of 1984 Amendments. Section 1220 of Pub.L. 98–473, Title II, c. XII, pt. K, Oct. 12, 1984, 98 Stat. 2167, provided: "This part [part K of chapter XII of Title II of Pub.L. 98–473] and the amendments made by this part shall take effect thirty days after the date of the enactment of this Act [Oct. 12, 1984]."

§ 3506. Service of papers filed in opposition to official request by United States to foreign government for criminal evidence

(a) Except as provided in subsection (b) of this section, any national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense shall serve such pleading or other document on the Attorney General at the time such pleading or other document is submitted.

(b) Any person who is a party to a criminal proceeding in a court of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense that is a subject of such proceeding shall serve such pleading or other document on the appropriate attorney for the Government, pursuant to the Federal Rules of Criminal Procedure, at the time such pleading or other document is submitted.

(c) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

(Added Pub.L. 98–473, Title II, § 1217(a), Oct. 12, 1984, 98 Stat. 2166.)

Effective Date. Section effective 30 days after Oct. 12, 1984, see section 1220 of Pub.L. 98–473 set out as a note under section 3505 of this title.

§ 3507. Special master at foreign deposition

Upon application of a party to a criminal case, a United States district court before which the case is pending may, to the extent permitted by a foreign country, appoint a special master to carry out at a deposition taken in that country such duties as the court may direct, including presiding at the deposition or serving as an advisor on questions of United States law. Notwithstanding any other provision of law, a special master appointed under this section shall not decide questions of privilege under foreign law. The refusal of a court to appoint a special master under this section, or of the foreign country to permit a special master appointed under this section to carry out a duty at a deposition in that country, shall not affect the admissibility in evidence of a deposition taken under the provisions of the Federal Rules of Criminal Procedure.

(Added Pub.L. 98–473, Title II, § 1217(a), Oct. 12, 1984, 98 Stat. 2166.)

Effective Date. Section effective 30 days after Oct. 12, 1984, see section 1220 of Pub.L. 98–473 set out as a note under section 3505 of this title.

CHAPTER 224—PROTECTION OF WITNESSES

Sec.
3521. Witness relocation and protection.
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3525. Victims Compensation Fund.
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§ 3521. Witness relocation and protection

(a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines

that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

(b)(1) In connection with the protection under this chapter of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General shall take such action as the Attorney General determines to be necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person, including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists. The Attorney General may, by regulation—

(A) provide suitable documents to enable the person to establish a new identity or otherwise protect the person;

(B) provide housing for the person;

(C) provide for the transportation of household furniture and other personal property to a new residence of the person;

(D) provide to the person a payment to meet basic living expenses, in a sum established in accordance with regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

(E) assist the person in obtaining employment;

(F) provide other services necessary to assist the person in becoming self-sustaining;

(G) disclose or refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure, except that the Attorney General shall, upon the request of State or local law enforcement officials or pursuant to a court order, without undue delay, disclose to such officials the identity, location, criminal records, and fingerprints relating to the person relocated or protected when the Attorney General knows or the request indicates that the person is under investigation for or has been arrested for or charged with an offense that is punishable by more than one year in prison or that is a crime of violence; and

(H) exempt procurement for services, materials, and supplies, and the renovation and construction of safe sites within existing buildings from other provisions of law as may be required to maintain the security of protective witnesses and the integrity of the Witness Security Program.

The Attorney General shall establish an accurate, efficient, and effective system of records concerning the criminal history of persons provided protection under this chapter in order to provide the information described in subparagraph.

(2) Deductions shall be made from any payment made to a person pursuant to paragraph (1)(D) to satisfy obligations of that person for family support payments pursuant to a State court order.

(3) Any person who, without the authorization of the Attorney General, knowingly discloses any information received from the Attorney General under paragraph (1)(G) shall be fined $5,000 or imprisoned five years, or both.

(c) Before providing protection to any person under this chapter, the Attorney General shall, to the extent practicable, obtain information relating to the suitability of the person for inclusion in the program, including the criminal history, if any, and a psychological evaluation of, the person. The Attorney General shall also make a written assessment in each case of the seriousness of the investigation or case in which the person's information or testimony has been or will be provided and the possible risk of danger to other persons and property in the community where the person is to be relocated and shall determine whether the need for that person's testimony outweighs the risk of danger to the public. In assessing whether a person should be provided protection under this chapter, the Attorney General shall consider the person's criminal record, alternatives to providing protection under this chapter, the possibility of securing similar testimony from other sources, the need for protecting the person, the relative importance of the person's testimony, results of psychological examinations, whether providing such protection will substantially infringe upon the relationship

between a child who would be relocated in connection with such protection and that child's parent who would not be so relocated, and such other factors as the Attorney General considers appropriate. The Attorney General shall not provide protection to any person under this chapter if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person's testimony. This subsection shall not be construed to authorize the disclosure of the written assessment made pursuant to this subsection.

(d)(1) Before providing protection to any person under this chapter, the Attorney General shall enter into a memorandum of understanding with that person. Each such memorandum of understanding shall set forth the responsibilities of that person, including—

(A) the agreement of the person, if a witness or potential witness, to testify in and provide information to all appropriate law enforcement officials concerning all appropriate proceedings;

(B) the agreement of the person not to commit any crime;

(C) the agreement of the person to take all necessary steps to avoid detection by others of the facts concerning the protection provided to that person under this chapter;

(D) the agreement of the person to comply with legal obligations and civil judgments against that person;

(E) the agreement of the person to cooperate with all reasonable requests of officers and employees of the Government who are providing protection under this chapter;

(F) the agreement of the person to designate another person to act as agent for the service of process;

(G) the agreement of the person to make a sworn statement of all outstanding legal obligations, including obligations concerning child custody and visitation;

(H) the agreement of the person to disclose any probation or parole responsibilities, and if the person is on probation or parole under State law, to consent to Federal supervision in accordance with section 3522 of this title; and

(I) the agreement of the person to regularly inform the appropriate program official of the activities and current address of such person.

Each such memorandum of understanding shall also set forth the protection which the Attorney General has determined will be provided to the person under this chapter, and the procedures to be followed in the case of a breach of the memorandum of understanding, as such procedures are established by the Attorney General. Such procedures shall include a procedure for filing and resolution of grievances of persons provided protection under this chapter regarding the administration of the program. This procedure shall include the opportunity for resolution of a grievance by a person who was not involved in the case.

(2) The Attorney General shall enter into a separate memorandum of understanding pursuant to this subsection with each person protected under this chapter who is eighteen years of age or older. The memorandum of understanding shall be signed by the Attorney General and the person protected.

(3) The Attorney General may delegate the responsibility initially to authorize protection under this chapter only to the Deputy Attorney General, to the Associate Attorney General, to the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, to the Assistant Attorney General in charge of Civil Rights Division of the Department of Justice (insofar as the delegation relates to a criminal civil rights case), and to one other officer or employee of the Department of Justice.

(e) If the Attorney General determines that harm to a person for whom protection may be provided under section 3521 of this title is imminent or that failure to provide immediate protection would otherwise seriously jeopardize an ongoing investigation, the Attorney General may provide temporary protection to such person under this chapter before making the written assessment and determination required by subsection (c) of this section or entering into the memorandum of understanding required by subsection (d) of this section. In such a case the Attorney General shall make such assessment and determination and enter into such memorandum of understanding without undue delay after the protection is initiated.

(f) The Attorney General may terminate the protection provided under this chapter to any person who substantially breaches the memorandum of understanding entered into between the Attorney General and that person pursuant to subsection (d), or who provides false information concerning the memorandum of understanding or the circumstances pursuant to which the person was provided protection under this chapter, including information with respect to the nature and circumstances concerning child custody and visitation. Before terminating such protection, the Attorney General shall send notice to the person involved of the termination of the protection provided under this chapter and the reasons for the termination. The decision

of the Attorney General to terminate such protection shall not be subject to judicial review.

(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2153.)

Effective Date. Section 1210 of Pub.L. 98–473, Title II, c. XII, pt. F, subpt. A, Oct. 12, 1984, 98 Stat. 2163, provided: "This subpart [subpart A of Part F of chapter XII of Title II of Pub.L. 98–473] and the amendments made by this subpart shall take effect on October 1, 1984."

Short Title of 1984 Amendment. Section 1207 of Pub.L. 98–473, Title II, c. XII, pt. F, subpt. A, Oct. 12, 1984, 98 Stat. 2153, provided: "This subpart [subpart A of Part F of chapter XII of Title II of Pub.L. 98–473] may be cited as the 'Witness Security Reform Act of 1984'."

§ 3522. Probationers and parolees

(a) A probation officer may, upon the request of the Attorney General, supervise any person provided protection under this chapter who is on probation or parole under State law, if the State involved consents to such supervision. Any person so supervised shall be under Federal jurisdiction during the period of supervision and shall, during that period be subject to all laws of the United States which pertain to parolees.

(b) The failure by any person provided protection under this chapter who is supervised under subsection (a) to comply with the memorandum of understanding entered into by that person pursuant to section 3521(d) of this title shall be grounds for the revocation of probation or parole, as the case may be.

(c) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with respect to a probationer or parolee transferred from State supervision pursuant to this section as they have with respect to an offender convicted in a court of the United States and paroled under chapter 311 of this title. The provisions of sections 4201 through 4204, 4205(a), (e), and (h), 4206 through 4216, and 4218 of this title shall apply following a revocation of probation or parole under this section.

(d) If a person provided protection under this chapter who is on probation or parole and is supervised under subsection (a) of this section has been ordered by the State court which imposed sentence on the person to pay a sum of money to the victim of the offense involved for damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the moneys ordered to be paid may be instituted by the Attorney General in any United States district court. Moneys recovered pursuant to such proceedings shall be distributed to the victim.

(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2157.)

Effective Date. Section effective on Oct. 1, 1984, see section 1210 of Pub.L. 98–473 set out as a note under section 3521 of this title.

§ 3523. Civil judgments

(a) If a person provided protection under this chapter is named as a defendant in a civil cause of action arising prior to or during the period in which the protection is provided, process in the civil proceeding may be served upon that person or an agent designated by that person for that purpose. The Attorney General shall make reasonable efforts to serve a copy of the process upon the person protected at the person's last known address. The Attorney General shall notify the plaintiff in the action whether such process has been served. If a judgment in such action is entered against that person the Attorney General shall determine whether the person has made reasonable efforts to comply with the judgment. The Attorney General shall take appropriate steps to urge the person to comply with the judgment. If the Attorney General determines that the person has not made reasonable efforts to comply with the judgment, the Attorney General may, after considering the danger to the person and upon the request of the person holding the judgment disclose the identity and location of the person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure of the identity and location of the person shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by the Attorney General shall not subject the United States and its officers or employees to any civil liability.

(b)(1) Any person who holds a judgment entered by a Federal or State court in his or her favor against a person provided protection under this chapter may, upon a decision by the Attorney General to deny disclosure of the current identity and location of such protected person, bring an action against the protected person in the United States district court in the district where the person holding the judgment (hereinafter in this subsection referred to as the "petitioner") resides. Such action shall be brought within one hundred and twenty days after the petitioner requested the Attorney General to disclose the identity and location of the protected person. The complaint in such action

shall contain statements that the petitioner holds a valid judgment of a Federal or State court against a person provided protection under this chapter and that the petitioner sought to enforce the judgment by requesting the Attorney General to disclose the identity and location of the protected person.

(2) The petitioner in an action described in paragraph (1) shall notify the Attorney General of the action at the same time the action is brought. The Attorney General shall appear in the action and shall affirm or deny the statements in the complaint that the person against whom the judgment is allegedly held is provided protection under this chapter and that the petitioner requested the Attorney General to disclose the identity and location of the protected person for the purpose of enforcing the judgment.

(3) Upon a determination (A) that the petitioner holds a judgment entered by a Federal or State court and (B) that the Attorney General has declined to disclose to the petitioner the current identity and location of the protected person against whom the judgment was entered, the court shall appoint a guardian to act on behalf of the petitioner to enforce the judgment. The clerk of the court shall forthwith furnish the guardian with a copy of the order of appointment. The Attorney General shall disclose to the guardian the current identity and location of the protected person and any other information necessary to enable the guardian to carry out his or her duties under this subsection.

(4) It is the duty of the guardian to proceed with all reasonable diligence and dispatch to enforce the rights of the petitioner under the judgment. The guardian shall, however, endeavor to carry out such enforcement duties in a manner that maximizes, to the extent practicable, the safety and security of the protected person. In no event shall the guardian disclose the new identity or location of the protected person without the permission of the Attorney General, except that such disclosure may be made to a Federal or State court in order to enforce the judgment. Any good faith disclosure made by the guardian in the performance of his or her duties under this subsection shall not create any civil liability against the United States or any of its officers or employees.

(5) Upon appointment, the guardian shall have the power to perform any act with respect to the judgment which the petitioner could perform, including the initiation of judicial enforcement actions in any Federal or State court or the assignment of such enforcement actions to a third party under applicable Federal or State law. The Federal Rules of Civil Procedure shall apply in any action brought under this subsection to enforce a Federal or State court judgment.

(6) The costs of any action brought under this subsection with respect to a judgment, including any enforcement action described in paragraph (5), and the compensation to be allowed to a guardian appointed in any such action shall be fixed by the court and shall be apportioned among the parties as follows: the petitioner shall be assessed in the amount the petitioner would have paid to collect on the judgment in an action not arising under the provisions of this subsection; the protected person shall be assessed the costs which are normally charged to debtors in similar actions and any other costs which are incurred as a result of an action brought under this subsection. In the event that the costs and compensation to the guardian are not met by the petitioner or by the protected person, the court may, in its discretion, enter judgment against the United States for costs and fees reasonably incurred as a result of the action brought under this subsection.

(7) No officer or employee of the Department of Justice shall in any way impede the efforts of a guardian appointed under this subsection to enforce the judgment with respect to which the guardian was appointed.

(c) The provisions of this section shall not apply to a court order to which section 3524 of this title applies.

(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2157.)

Effective Date. Section effective on Oct. 1, 1984, see section 1210 of Pub.L. 98–473 set out as a note under section 3521 of this title.

§ 3524. Child custody arrangements

(a) The Attorney General may not relocate any child in connection with protection provided to a person under this chapter if it appears that a person other than that protected person has legal custody of that child.

(b) Before protection is provided under this chapter to any person (1) who is a parent of a child of whom that person has custody, and (2) who has obligations to another parent of that child with respect to custody or visitation of that child under a court order, the Attorney General shall obtain and examine a copy of such order for the purpose of assuring that compliance with the order can be achieved. If compliance with a visitation order cannot be achieved, the Attorney General may provide protection under this chapter to the person only if the parent being relocated initiates legal action to modify the existing court order under subsection (e)(1) of this section. The parent being relocated must agree in writing before being pro-

vided protection to abide by any ensuing court orders issued as a result of an action to modify.

(c) With respect to any person provided protection under this chapter (1) who is the parent of a child who is relocated in connection with such protection and (2) who has obligations to another parent of that child with respect to custody or visitation of that child under a State court order, the Attorney General shall, as soon as practicable after the person and child are so relocated, notify in writing the child's parent who is not so relocated that the child has been provided protection under this chapter. The notification shall also include statements that the rights of the parent not so relocated to visitation or custody, or both, under the court order shall not be infringed by the relocation of the child and the Department of Justice responsibility with respect thereto. The Department of Justice will pay all reasonable costs of transportation and security incurred in insuring that visitation can occur at a secure location as designated by the United States Marshals Service, but in no event shall it be obligated to pay such costs for visitation in excess of thirty days a year, or twelve in number a year. Additional visitation may be paid for, in the discretion of the Attorney General, by the Department of Justice in extraordinary circumstances. In the event that the unrelocated parent pays visitation costs, the Department of Justice may, in the discretion of the Attorney General, extend security arrangements associated with such visitation.

(d)(1) With respect to any person provided protection under this chapter (A) who is the parent of a child who is relocated in connection with such protection and (B) who has obligations to another parent of that child with respect to custody or visitation of that child under a court order, an action to modify that court order may be brought by any party to the court order in the District Court for the District of Columbia or in the district court for the district in which the child's parent resides who has not been relocated in connection with such protection.

(2) With respect to actions brought under paragraph (1), the district courts shall establish a procedure to provide a reasonable opportunity for the parties to the court order to mediate their dispute with respect to the order. The court shall provide a mediator for this purpose. If the dispute is mediated, the court shall issue an order in accordance with the resolution of the dispute.

(3) If, within sixty days after an action is brought under paragraph (1) to modify a court order, the dispute has not been mediated, any party to the court order may request arbitration of the dispute. In the case of such a request, the court shall appoint a master to act as arbitrator, who shall be experienced in domestic relations matters. Rule 53 of the Federal Rules of Civil Procedure shall apply to masters appointed under this paragraph. The court and the master shall, in determining the dispute, give substantial deference to the need for maintaining parent-child relationships, and any order issued by the court shall be in the best interests of the child. In actions to modify a court order brought under this subsection, the court and the master shall apply the law of the State in which the court order was issued or, in the case of the modification of a court order issued by a district court under this section, the law of the State in which the parent resides who was not relocated in connection with the protection provided under this chapter. The costs to the Government of carrying out a court order may be considered in an action brought under this subsection to modify that court order but shall not outweigh the relative interests of the parties themselves and the child.

(4) Until a court order is modified under this subsection, all parties to that court order shall comply with their obligations under that court order subject to the limitations set forth in subsection (c) of this section.

(5) With respect to any person provided protection under this chapter who is the parent of a child who is relocated in connection with such protection, the parent not relocated in connection with such protection may bring an action, in the District Court for the District of Columbia or in the district court for the district in which that parent resides, for violation by that protected person of a court order with respect to custody or visitation of that child. If the court finds that such a violation has occurred, the court may hold in contempt the protected person. Once held in contempt, the protected person shall have a maximum of sixty days, in the discretion of the Attorney General, to comply with the court order. If the protected person fails to comply with the order within the time specified by the Attorney General, the Attorney General shall disclose the new identity and address of the protected person to the other parent and terminate any financial assistance to the protected person unless otherwise directed by the court.

(6) The United States shall be required by the court to pay litigation costs, including reasonable attorneys' fees, incurred by a parent who prevails in enforcing a custody or visitation order; but shall retain the right to recover such costs from the protected person.

(e)(1) In any case in which the Attorney General determines that, as a result of the relocation of a person and a child of whom that person is a parent

in connection with protection provided under this chapter, the implementation of a court order with respect to custody or visitation of that child would be substantially impossible, the Attorney General may bring, on behalf of the person provided protection under this chapter, an action to modify the court order. Such action may be brought in the district court for the district in which the parent resides who would not be or was not relocated in connection with the protection provided under this chapter. In an action brought under this paragraph, if the Attorney General establishes, by clear and convincing evidence, that implementation of the court order involved would be substantially impossible, the court may modify the court order but shall, subject to appropriate security considerations, provide an alternative as substantially equivalent to the original rights of the nonrelocating parent as feasible under the circumstances.

(2) With respect to any State court order in effect to which this section applies, and with respect to any district court order in effect which is issued under this section, if the parent who is not relocated in connection with protection provided under this chapter intentionally violates a reasonable security requirement imposed by the Attorney General with respect to the implementation of that court order, the Attorney General may bring an action in the district court for the district in which that parent resides to modify the court order. The court may modify the court order if the court finds such an intentional violation.

(3) The procedures for mediation and arbitration provided under subsection (d) of this section shall not apply to actions for modification brought under this subsection.

(f) In any case in which a person provided protection under this chapter is the parent of a child of whom that person has custody and has obligations to another parent of that child concerning custody and visitation of that child which are not imposed by court order, that person, or the parent not relocated in connection with such protection, may bring an action in the district court of the district in which that parent not relocated resides to obtain an order providing for custody or visitation, or both, of that child. In any such action all the provisions of subsection (d) of this section shall apply.

(g) In any case in which an action under this section involves court orders from different States with respect to custody or visitation of the same child, the court shall resolve any conflicts by applying the rules of conflict of laws of the State in which the court is sitting.

(h)(1) Subject to paragraph (2), the costs of any action described in subsection (d), (e), or (f) of this section shall be paid by the United States.

(2) The Attorney General shall insure that any State court order in effect to which this section applies and any district court order in effect which is issued under this section are carried out. The Department of Justice shall pay all costs and fees described in subsections (c) and (d) of this section.

(i) As used in this section, the term "parent" includes any person who stands in the place of a parent by law.

(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2159.)

Effective Date. Section effective on Oct. 1, 1984, see section 1210 of Pub.L. 98–473 set out as a note under section 3521 of this title.

§ 3525. Victims Compensation Fund

(a) The Attorney General may pay restitution to, or in the case of death, compensation for the death of any victim of a crime that causes or threatens death or serious bodily injury and that is committed by any person during a period in which that person is provided protection under this chapter.

(b) Not later than four months after the end of each fiscal year, the Attorney General shall transmit to the Congress a detailed report on payments made under this section for such year.

(c) There are authorized to be appropriated for the fiscal year 1985 and for each fiscal year thereafter, $1,000,000 for payments under this section.

(d) The Attorney General shall establish guidelines and procedures for making payments under this section. The payments to victims under this section shall be made for the types of expenses provided for in section 3579(b) of this title, except that in the case of the death of the victim, an amount not to exceed $50,000 may be paid to the victim's estate. No payment may be made under this section to a victim unless the victim has sought restitution and compensation provided under Federal or State law or by civil action. Such payments may be made only to the extent the victim, or the victim's estate, has not otherwise received restitution and compensation, including insurance payments, for the crime involved. Payments may be made under this section to victims of crimes occurring on or after the date of the enactment of this chapter. In the case of a crime occurring before the date of the enactment of this chapter, a payment may be made under this section only in the case of the death of the victim, and then only in an amount not exceeding $25,000, and such a payment may be made notwithstanding the requirements of the third sentence of this subsection.

(e) Nothing in this section shall be construed to create a cause of action against the United States.
(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2162.)

Effective Date. Section effective on Oct. 1, 1984, see section 1210 of Pub.L. 98–473 set out as a note under section 3521 of this title.

§ 3526. Cooperation of other Federal agencies and State governments; reimbursement of expenses

(a) Each Federal agency shall cooperate with the Attorney General in carrying out the provisions of this chapter and may provide, on a reimbursable basis, such personnel and services as the Attorney General may request in carrying out those provisions.

(b) In any case in which a State government requests the Attorney General to provide protection to any person under this chapter—

(1) the Attorney General may enter into an agreement with that State government in which that government agrees to reimburse the United States for expenses incurred in providing protection to that person under this chapter; and

(2) the Attorney General shall enter into an agreement with that State government in which that government agrees to cooperate with the Attorney General in carrying out the provisions of this chapter with respect to all persons.

(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2162.)

Effective Date. Section effective on Oct. 1, 1984, see section 1210 of Pub.L. 98–473 set out as a note under section 3521 of this title.

§ 3527. Additional authority of Attorney General

The Attorney General may enter into such contracts or other agreements as may be necessary to carry out this chapter. Any such contract or agreement which would result in the United States being obligated to make outlays may be entered into only to the extent and in such amount as may be provided in advance in an appropriation Act.
(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2163.)

Effective Date. Section effective on Oct. 1, 1984, see section 1210 of Pub.L. 98–473 set out as a note under section 3521 of this title.

§ 3528. Definition

For purposes of this chapter, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.
(Added Pub.L. 98–473, Title II, § 1208, Oct. 12, 1984, 98 Stat. 2163.)

Effective Date. Section effective on Oct. 1, 1984, see section 1210 of Pub.L. 98–473 set out as a note under section 3521 of this title.

CHAPTER 225—VERDICT

Sec.

3531. Return; several defendants; conviction of less offense; poll of jury—Rule.
3532. Setting aside verdict of guilty; judgment notwithstanding verdict—Rule.

§ 3531. Return; several defendants; conviction of less offense; poll of jury—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Verdict to be unanimous; return; several defendants; disagreement; conviction of less offense; poll of jury, Rule 31.

§ 3532. Setting aside verdict of guilty; judgment notwithstanding verdict—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Setting aside verdict of guilty on motion for judgment of acquittal, entering of such judgment, or ordering new trial; absence of verdict, Rule 29(b).

CHAPTER 227 [1]—SENTENCES

Subchapter

A. General Provisions 3551
B. Probation 3561
C. Fines 3571
D. Imprisonment 3581

[1] Another chapter 227 (§§ 3561 to 3580), which is currently effective, is set out post.

SUBCHAPTER A—GENERAL PROVISIONS

Sec.

3551. Authorized sentences.
3552. Presentence reports.
3553. Imposition of a sentence.
3554. Order of criminal forfeiture.
3555. Order of notice to victims.
3556. Order of restitution.
3557. Review of a sentence.
3558. Implementation of a sentence.
3559. Sentencing classification of offenses.

SUBCHAPTER A—GENERAL PROVISIONS

§ 3551. Authorized sentences

(a) **In general.**—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) **Individuals.**—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) **Organizations.**—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1988.)

Effective Date and Savings Provisions of Sentencing Reform Act of 1984 (Pub.L. 98–473, Title II, c. II, §§ 211 to 239); Terms of Members of U.S. Sentencing Commission and U.S. Parole Commission; Parole Release Dates; Membership of National Institute of Corrections, Advisory Corrections Council, and U.S. Sentencing Commission. Section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, provided:

"(a)(1) This chapter [chapter II, §§ 211–239, of Title II of Pub.L. 98–473] shall take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment [Oct. 12, 1984], except that—

"(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment;

"(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1983, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated to section 994(a)(1) of title 28 to the Congress within eighteen months of the effective date of the chapter; and

"(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, shall not go into effect until the day after—

"(I) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (B)(i), along with a report stating the reasons for the Commission's recommendations;

"(II) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within one hundred and fifty days of submission of the guidelines, reported to the Congress the results of its study; and

"(III) the Congress has had six months after the date described in subclause (I) in which to examine the guidelines and consider the reports; and

"(IV) the provisions of sections 227 and 228 [sections 227 and 228 of chapter II of Title II of Pub.L. 98–473] shall take effect on the date of enactment.

"(2) For the purposes of section 992(a) of title 28, the terms of the first members of the United States Sentencing Commission shall not begin to run until the sentencing guidelines go into effect pursuant to paragraph (1)(B)(ii).

"(b)(1) The following provisions of law in effect on the day before the effective date of this Act shall remain in effect for five years after the effective date as to an individual convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B):

"(A) Chapter 311 of title 18, United States Code.

"(B) Chapter 309 of title 18, United States Code.

"(C) Sections 4251 through 4255 of title 18, United States Code.

"(D) Sections 5041 and 5042 of title 18, United States Code.

"(E) Sections 5017 through 5020 of title 18, United States Code, as to a sentence imposed before the date of enactment.

"(F) The maximum term of imprisonment in effect on the effective date for an offense committed before the effective date.

"(G) Any other law relating to a violation of a condition of release or to arrest authority with regard to a person who violates a condition of release.

"(2) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect on the day before

the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.

"(3) The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

"(4) Notwithstanding the other provisions of this subsection, all laws in effect on the day before the effective date of this Act pertaining to an individual who is—

"(A) released pursuant to a provision listed in paragraph (1); and

"(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or

"(ii) released on a date set pursuant to paragraph (3);

"including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to the individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

"(5) Notwithstanding the provisions of section 991 of title 28, United States Code, and sections 4351 and 5002 of title 18, United States Code, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a nonvoting member of the United States Sentencing Commission, ex officio, until the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 4351 of title 18, during the five-year period the National Institute of Corrections shall have seventeen members, including seven ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio, nonvoting members."

Short Title. Section 211 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 1987, provided: "This chapter [chapter II of Title II of Pub.L. 98–473] may be cited as the 'Sentencing Reform Act of 1984'."

Sentencing Considerations Prior to Enactment of Guidelines. Section 239 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2039, provided:

"Since, due to an impending crisis in prison overcrowding, available Federal prison space must be treated as a scarce resource in the sentencing of criminal defendants;

"Since, sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society;

"Since, in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service;

"Since, in the two years preceding the enactment of sentencing guidelines, Federal sentencing practice should ensure that scarce prison resources are available to house violent and serious criminal offenders by the increased use of restitution, community service, and other alternative sentences in cases of nonviolent and nonserious offenders: Now, therefore, be it

"Declared, That it is the sense of the Senate that in the two years preceding the enactment of the sentencing guidelines, Federal judges, in determining the particular sentence to be imposed, consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense; and

"(3) the general appropriateness of imposing a sentence of imprisonment in cases in which the defendant has been convicted of a crime of violence or otherwise serious offense."

§ 3552. Presentence reports

(a) Presentence investigation and report by probation officer.—A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) Presentence study and report by bureau of prisons.—If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall take no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for

the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

(c) Presentence examination and report by psychiatric or psychological examiners.—If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a psychiatric or psychological examination and that the court be provided with a written report of the results of the examination pursuant to the provisions of section 4247.

(d) Disclosure of presentence reports.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1988.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the sentence does not include an order of restitution, the court shall include in the statement the reason therefor. The clerk of the court shall pro-

vide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice or restitution.—Prior to imposing an order of notice pursuant to section 3555, or an order of restitution pursuant to section 3556, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1990.)

References in Text. Title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in text, are Titles II and III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, which are principally classified to subchapters I and II of chapter 13 of Title 21, Food and Drugs.

Section 413 of such Act, referred to in text, is section 413 of Pub.L. 91–513, added Pub.L. 98–473, Title II, c. III, part B, § 303, Oct. 12, 1984, 98 Stat. 2044, which is classified to section 853 of Title 21.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3555. Order of notice to victims

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3556. Order of restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense under this title, or an offense under section 902(h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3557. Review of a sentence

The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3558. Implementation of a sentence

The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3559. Sentencing classification of offenses

(A) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified—

(1) if the maximum term of imprisonment authorized is—

(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(B) twenty years or more, as a Class B felony;

(C) less than twenty years but ten or more years, as a Class C felony;

(D) less than ten years but five or more years, as a Class D felony;

(E) less than five years but more than one year, as a Class E felony;

(F) one year or less but more than six months, as a Class A misdemeanor;

(G) six months or less but more than thirty days, as a Class B misdemeanor;

(H) thirty days or less but more than five days, as a Class C misdemeanor; or

(I) five days or less, or if no imprisonment is authorized, as an infraction.

(b) Effect of classification.—An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

SUBCHAPTER B—PROBATION

Sec.
3561. Sentence of probation.
3562. Imposition of a sentence of probation.
3563. Conditions of probation.
3564. Running of a term of probation.
3565. Revocation of probation.
3566. Implementation of a sentence of probation.

SUBCHAPTER B—PROBATION

§ 3561.[1] Sentence of probation

(a) In General.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

(1) the offense is a Class A or Class B felony;

(2) the offense is an offense for which probation has been expressly precluded; or

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

The liability of a defendant for any unexecuted fine or other punishment imposed as to which probation is granted shall be fully discharged by the fulfillment of the terms and conditions of probation.

(b) Authorized terms.—The authorized terms of probation are—

(1) for a felony, not less than one nor more than five years;

(2) for a misdemeanor, not more than five years; and

(3) for an infraction, not more than one year.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1992.)

[1] Another section 3561 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3562.[1] Imposition of a sentence of probation

(a) Factors to be considered in imposing a term of probation.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

(b) Effect of finality of judgment.—Notwithstanding the fact that a sentence of probation can subsequently be—

(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1992.)

[1] Another section 3562 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3563.[1] Conditions of probation

(a) Mandatory conditions.—The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

(b) Discretionary conditions.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

(1) support his dependents and meet other family responsibilities;

(2) pay a fine imposed pursuant to the provisions of subchapter C;

(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

(13) work in community service as directed by the court;

(14) reside in a specified place or area, or refrain from residing in a specified place or area;

(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(16) report to a probation officer as directed by the court or the probation officer;

(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

(20) satisfy such other conditions as the court may impose.

(c) Modifications of conditions.—The court may, after a hearing, modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

(d) Written statement of conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1993.)

[1] Another section 3563 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3564.[1] Running of a term of probation

(a) Commencement.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

(b) Concurrence with other sentences.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned for a period of at least thirty consecutive days in connection with a conviction for a Federal, State, or local crime.

(c) Early termination.—The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

(d) Extension.—The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

(e) Subject to revocation.—A sentence of probation remains conditional and subject to revocation until its expiration or termination.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1994.)

[1] Another section 3564 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3565.[1] Revocation of probation

(a) Continuation or revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

(b) Delayed revocation.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995.)

[1] Another section 3565 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3566.[1] Implementation of a sentence of probation

The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995.)

[1] Another section 3566 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

SUBCHAPTER C—FINES

Sec.
3571. Sentence of fine.
3572. Imposition of a sentence of fine.
3573. Modification or remission of fine.
3574. Implementation of a sentence of fine.

SUBCHAPTER C—FINES

§ 3571.[1] Sentence of fine

(a) In general.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Authorized fines.—Except as otherwise provided in this chapter, the authorized fines are—

(1) if the defendant is an individual—

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

(B) for any other misdemeanor, not more than $25,000; and

(C) for an infraction, not more than $1,000; and

(2) if the defendant is an organization—

(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $500,000;

(B) for any other misdemeanor, not more than $100,000; and

(C) for an infraction, not more than $10,000.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995.)

[1] Another section 3571 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3572.[1] Imposition of a sentence of fine

(a) Factors to be considered in imposing fine.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider—

(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant, relative to the burden which alternative punishments would impose;

(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

(5) any other pertinent equitable consideration.

(b) Limit on aggregate of multiple fines.—Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

(c) Effect of finality of judgment.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

(1) modified or remitted pursuant to the provisions of section 3573;

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(d) Time and method of payment.—Payment of a fine is due immediately unless the court, at the time of sentencing—

(1) requires payment by a date certain; or

(2) establishes an installment schedule, the specific terms of which shall be fixed by the court.

(e) Alternative sentence precluded.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

(f) Individual responsibility for payment.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) Responsibility to provide current address.—At the time of imposition of the fine, the court shall order the person fined to provide the Attorney

General with a current mailing address for the entire period that any part of the fine remains unpaid. Failure to provide the Attorney General with a current address or a change in address shall be punishable as a contempt of court.

(h) Stay of fine pending appeals.—Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay—

(1) a requirement that the defendant, pending appeal, to deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

(i) Delinquent fine.—A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

(j) Default.—A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due with thirty days of notification of the default, notwithstanding any installment schedule.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1995.)

[1] Another section 3572 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3573.[1] Modification or remission of fine

(a) Petition for modification or remission.—A defendant who has been sentenced to pay a fine, and who—

(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for—

(A) an extension of the installment schedule, not to exceed two years except in case of incarceration or special circumstances; or

(B) a remission of all or part of the unpaid portion including interest and penalties; or

(2) has voluntarily made restitution or reparation to the victim of the offense, may at any time petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

Any petition filed pursuant to this subsection shall be filed in the court in which sentence was originally imposed, unless that court transfers jurisdiction to another court. The petitioner shall notify the Attorney General that the petition has been filed within ten working days after filing. For the purposes of clause (1), unless exceptional circumstances exist, a person may be considered to have made a good faith effort to comply with the terms of the sentence only after payment of a reasonable portion of the fine.

(b) Order of modification or remission.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order, in which case it shall provide the Attorney General with a copy of such order.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1997.)

[1] Another section 3573 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3574.[1] Implementation of a sentence of fine

The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1997.)

[1] Another section 3574 is set out in another chapter 227 post. A section 3580 is set out in another chapter 227 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

SUBCHAPTER D—IMPRISONMENT

Sec.
3581. Sentence of imprisonment.
3582. Imposition of a sentence of imprisonment.
3583. Inclusion of a term of supervised release after imprisonment.
3584. Multiple sentences of imprisonment.
3585. Calculation of a term of imprisonment.
3586. Implementation of a sentence of imprisonment.

SUBCHAPTER D—IMPRISONMENT

§ 3581. Sentence of imprisonment

(a) In general.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) Authorized terms.—The authorized terms of imprisonment are—

(1) for a Class A felony, the duration of the defendant's life or any period of time;

(2) for a Class B felony, not more than twenty-five years;

(3) for a Class C felony, not more than twelve years;

(4) for a Class D felony, not more than six years;

(5) for a Class E felony, not more than three years;

(6) for a Class A misdemeanor, not more than one year;

(7) for a Class B misdemeanor, not more than six months;

(8) for a Class C misdemeanor, not more than thirty days; and

(9) for an infraction, not more than five days.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) Inclusion of an order to limit criminal association of organized crime and drug offenders.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communica-

tion with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.
(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

(b) Authorized terms of supervised release.—The authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than three years;

(2) for a Class C or Class D felony, not more than two years; and

(3) for a Class E felony, or for a misdemeanor, not more than one year.

(c) Factors to be considered in including a term of supervised release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

(d) Conditions of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B) and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of term or conditions.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the terms and conditions of postrelease supervision; or

(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title.

(f) Written statement of conditions.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.
(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1999.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3584. Multiple sentences of imprisonment

(a) Imposition of concurrent or consecutive terms.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall

consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate.—Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2000.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3585. Calculation of a term of imprisonment

(a) Commencement of sentence.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) Credit for prior custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

§ 3586. Implementation of a sentence of imprisonment

The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out under section 3551 of this chapter.

CHAPTER 227 [1]—SENTENCE, JUDGMENT, AND EXECUTION

Sec.
3561. Judgment form and entry—Rule.
3562. Sentence—Rule.
3563. Corruption of blood or forfeiture of estate.
3564. Pillory and whipping.
3565. Collection and payment of fines and penalties.
3566. Execution of death sentence.
3567. Death sentence may prescribe dissection.
3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.
3569. Discharge of indigent prisoner.
3570. Presidential remission as affecting unremitted part.
3571. Clerical mistakes—Rule.
3572. Correction or reduction of sentence—Rule.
3573. Arrest or setting aside of judgment—Rule.
3574. Stay of execution; supersedeas—Rule.
3575. Increased sentence for dangerous special offenders.
3576. Review of sentence.
3577. Use of information for sentencing.
3578. Conviction records.
3579. Nature of order of restitution.[2]
3580. Procedure for issuing order of restitution.

[1] Another chapter 227 (§§ 3551 to 3559, 3561 to 3566, 3571 to 3574, 3581 to 3586), effective Nov. 1, 1986, is set out ante.

[2] So in original. Does not conform to section catchline.

Repeal and Renumbering of Chapter

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this chapter and renumbered sections 3577 to 3580 as sections 3661 to 3664 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Amendment of Section Analysis

Section 238(g)(2) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2039, struck out the item for section 3565 in the table of sections and inserted in lieu thereof "3565. Repealed.", eff. Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

See Codification note below.

Codification. Pub.L. 98–596, § 12(a)(7)(B), Oct. 30, 1984, 98 Stat. 3139, inserted in the table of sections "3565. Collection and payment of fines and penalties.", effective Oct. 12, 1984, pursuant to section 12(b) of Pub.L. 98–596. This amendment was not executed to text since the identical item 3565 was presently in text. This amendment was a probable attempt to restore the item for section 3565 which was struck out by Pub.L. 98–473, Title II, c. II, § 238(g)(2), Oct. 12, 1984, 98 Stat. 2039, effective, however, on Nov. 1, 1986. See Amendment of Analysis note above.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3561.[1] Judgment form and entry—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Judgment to be signed by judge and entered by clerk, Rule 32(b).

[1] Another section 3561 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3562.[1] Sentence—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Imposition of sentence; commitment; bail; presentence investigation and report, Rule 32(a, c).

[1] Another section 3562 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealcd this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3563.[1] Corruption of blood or forfeiture of estate

No conviction or judgment shall work corruption of blood or any forfeiture of estate.

[1] Another section 3563 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 544 (Mar. 4, 1909, ch. 321, § 324, 35 Stat. 1151).

§ 3564.[1] Pillory and whipping

The punishment of whipping and of standing in the pillory shall not be inflicted.

[1] Another section 3564 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 545 (Mar. 4, 1909, ch. 321, § 325, 35 Stat. 1151).

§ 3565.[1] Collection and payment of fines and penalties

(a)(1) Except as provided in paragraph (2) of this subsection, in all criminal cases in which judgment or sentence is rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, such judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases. If the court finds by a preponderance of the information relied upon in imposing sentence that the defendant has the present ability to pay a fine or penalty, the judgment may direct imprisonment until the fine or penalty is paid, and the issue of execution on the judgment shall not discharge the defendant from imprisonment until the amount of the judgment is paid.

(2) A judgment imposing the payment of a fine or penalty shall, upon the filing of notice of lien in the manner in which a notice of tax lien would be filed under section 6323(f) of the Internal Revenue Code of 1954, be a lien in favor of the United States upon all property and rights of property belonging to the defendant, except with respect to properties or transactions specified in subsections (b), (c) or (d) of section 6323 of the Internal Revenue Code of 1954 for which a notice of tax lien properly filed on the same date would not be valid and except with respect to property that would be exempt from levy for taxes under section 6334(a) of the Code. Such lien shall be valid against any subsequent purchaser, holder of a security interest, mechanic's lienor or judgment creditor. A writ of execution may be issued with respect to any property or rights to property subject to such lien.

(3) Such lien is valid against property referred to in paragraph (2) of this subsection if, but for such paragraph, applicable law would permit enforcement of the lien.

(4) The effect of any execution, whether by attachment, garnishment, levy or other means, on salary, wages or other income payable to or receivable by a defendant shall be continuous from the date such execution is first made until the liability for the fine or penalty to which the execution relates is satisfied, the liability ceases to exist or becomes unenforceable, or the execution is released. Salaries, wages and other income shall be exempt from execution only to the extent of the exemptions from levy for taxes provided in section 6334(d) of the Internal Revenue Code of 1954.

(5) For the purposes of any State or local law providing for the filing of a notice of a tax lien, a notice of lien for a judgment imposing the payment of a fine or penalty shall be considered a notice of

lien for taxes payable to the United States. If such notice is not accepted for filing, the registration, recording, docketing, or indexing, of the judgment imposing payment of a fine or penalty in accordance with section 1962 of title 28, United States Code shall be considered for all purposes as the filing prescribed by this subsection.

(b)(1) A judgment imposing the payment of a fine or penalty shall—

(A) provide for immediate payment unless, in the interest of justice, the court specifies payment on a date certain or in installments;

(B) include the name and address of the defendant, the docket number of the case, the amount of the fine, and the schedule of payments (if other than immediate payment is specified); and

(C) if other than immediate payment is specified, require the defendant to notify the appropriate United States Attorney of any change in the name or address of the defendant.

(2) If the judgment specifies other than immediate payment of a fine or penalty, the period provided for payment shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense. The defendant shall pay interest on any amount payment of which is deferred under this paragraph. The interest shall be computed on the unpaid balance at the rate of 1.5 percent per month for each full calendar month for which such amount is unpaid.

(3) If the judgment specifies other than immediate payment of a fine or penalty, and the defendant does not pay an amount due, at the discretion of the Attorney General, the entire unpaid balance shall be payable immediately.

(c)(1) The defendant shall pay interest on any amount of a fine or penalty (other than a penalty under paragraph (2) of this subsection) that is past due. The interest shall be computed on the unpaid balance at the rate of 1.5 percent per month.

(2) If an amount owed by a defendant as a fine or penalty is past due for more than 90 days, the defendant shall pay, in addition to any amount otherwise payable, a penalty equal to 25 percent of the amount past due.

(d)(1) Except as provided in paragraph (2) of this subsection, the defendant shall pay to the Attorney General any amount due as a fine or penalty.

(2) The Attorney General and the Director of the Administrative Office of the United States Courts may jointly provide by regulation that fines and penalties for specified categories of offenses shall be paid to the clerk of the court.

(e) If a fine or penalty exceeds $500, the clerk of the court shall furnish to the Attorney General a certified copy of the judgment.

(f) If a fine or penalty is imposed on an organization, it is the duty of each individual authorized to make disbursements for the organization to make payment from assets of the organization. If a fine or penalty is imposed on a director, officer, employee, or agent of an organization, payment shall not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) When a fine or penalty is satisfied as provided by law, the Attorney General shall file with the court a notice of satisfaction of judgment if the defendant makes a written request to the Attorney General for such filing, or if the amount of the fine or penalty exceeds $500. Upon request of the defendant, the clerk shall furnish to the defendant a certified copy of the notice.

(h) The obligation to pay a fine or penalty ceases upon the death of the defendant or the expiration of twenty years after the date of the entry of the judgment, whichever occurs earlier. The defendant and the Attorney General may agree in writing to extend such twenty-year period.

(As amended Oct. 30, 1984, Pub.L. 98–596, § 2, 98 Stat. 3134.)

[1] Another section 3565 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98–473, Title II, c. II, §§ 212(a)(2) and 238(g)(1), Oct. 12, 1984, 98 Stat. 1987, 2039, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473. See Codification note below.

Codification. Pub.L. 98–596, § 12(a)(7)(A), Oct. 30, 1984, 98 Stat. 3139, re-enacted this section (effective Oct. 12, 1984, pursuant to section 12(b) of Pub.L. 98–596) with language identical to existing text prior to its amendment by section 2 of Pub.L. 98–596. The reenactment was a probable attempt to restore the text of section 3565 which had been repealed by Pub.L. 98–473, Title II, c. II, § 212(a)(2) and § 238(g)(1), Oct. 12, 1984, 98 Stat. 1987, 2039, effective, however, on Nov. 1, 1986. See Repeal of Section note above.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 569 (R.S. § 1041). Minor changes were made in phraseology.

Effective Date of 1984 Amendment. Amendment of this section by section 2 of Pub.L. 98–596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98–596 set out as a note under section 1 of this title.

Repeal of Termination of Amendments. Section 12(a)(9) of Pub.L. 98–596, Oct. 30, 1984, 98 Stat. 3134,

repealed section 238(i) of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 2039, which had repealed the amendments made by it effective Nov. 1, 1986, enacting chapter 228 (§§ 3591 to 3599), amending sections 3569, 4209(a), and 4214(b)(1), and repealing section 3565 of this title.

§ 3566.[1] Execution of death sentence

The manner of inflicting the punishment of death shall be that prescribed by the laws of the place within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available local facilities and the services of an appropriate local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the place within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other place in which such sentence shall be executed in the manner prescribed by the laws thereof.

[1] Another section 3566 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 542 (Mar. 4, 1909, ch. 321, § 323, 35 Stat. 1151, June 19, 1937, ch. 367, 50 Stat. 304).

Word "place" was substituted for "State" in three places, so as to make it clear that this section applies to a district, possession or territory, as well as to a state. In a recent Hawaiian case in which the death penalty was imposed, this section was the only authority for the execution in the manner prescribed by Hawaiian law.

Minor changes were made in phraseology.

§ 3567. Death sentence may prescribe dissection

The court before which any person is convicted of murder in the first degree, or rape, may, in its discretion, add to the judgment of death, that the body of the offender be delivered to a surgeon for dissection; and the marshal who executes such judgment shall deliver the body, after execution, to such surgeon as the court may direct; and such surgeon, or some person appointed by him, shall receive and take away the body at the time of execution.

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 543 (Mar. 4, 1909, ch. 321, § 331, 35 Stat. 1152).

§ 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

(As amended Sept. 2, 1960, Pub.L. 86–691, § 1(a), 74 Stat. 738; June 22, 1966, Pub.L. 89–465, § 4, 80 Stat. 217.)

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 709a (June 29, 1932, ch. 310, § 1, 47 Stat. 381).

Minor change in phraseology was made.

§ 3569. Discharge of indigent prisoner

When a poor convict, sentenced for violation of any law of the United States by any court established by enactment of Congress, to be imprisoned and pay a fine, or fine and costs, or to pay a fine, or fine and costs, has been confined in prison, solely for the nonpayment of such fine, or fine and costs, such convict may make application in writing to the nearest United States magistrate in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be

heard, the magistrate shall proceed to hear and determine the matter.

If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the magistrate shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, exceeding $20, except such as is by law exempt from being taken on civil process for debt; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the magistrate shall file with the institution in which the convict is confined, a certificate setting forth the facts. In case the convict is found by the magistrate to possess property valued at an amount in excess of said exemption, nevertheless, if the Attorney General finds that the retention by such convict of all of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for the nonpayment of such fine, or fine and costs; or if he finds that the retention by such convict of any part of such property is reasonably necessary for his support or that of his family, such convict shall be released without further imprisonment solely for nonpayment of such fine or fine and costs upon payment on account of his fine and costs, of that portion of his property in excess of the amount found to be reasonably necessary for his support or that of his family.

(As amended Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(1), (3), 82 Stat. 1115; Oct. 30, 1984, Pub.L. 98–596, § 3, 98 Stat. 3136.)

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Amendment of Section

Pub.L. 98–473, Title II, §§ 235, 238(h), Oct. 12, 1984, 98 Stat. 2031, 2039, provided that effective Nov. 1, 1986, this section is amended by striking out "(a)" which preceded first paragraph beginning "When a poor" and by striking out subsec. (b) which read:

"(b) Any such indigent prisoner in a Federal institution may, in the first instance, make his application to the warden of such institution, who shall have all the powers of a United States magistrate in such matters, and upon proper showing in support of the application shall administer the oath required by subsection (a) of this section, discharge the prisoner, and file his certificate to that effect in the records of the institution.

"Any such indigent prisoner, to whom the warden shall fail or refuse to administer the oath may apply to the nearest magistrate for the relief authorized by this section and the magistrate shall proceed de novo to hear and determine the matter."

See Codification note below.

Codification. Pub.L. 98–596, § 12(a)(8), Oct. 30, 1984, 98 Stat. 3139, restored the letter designation "(a)" preceding "When a" at the beginning of the first paragraph of this section and restored the subsec. (b) which had been deleted by Pub.L. 98–473 (see Amendment of Section note above), effective Oct. 12, 1984, pursuant to section 12(b) of Pub.L. 98–596. This amendment was not executed to text since the identical language was presently in text. The amendment was a probable attempt to restore the text of section 3569 which was amended by Pub.L. 98–473, Title II, c. II, § 238(h), Oct. 12, 1984, 98 Stat. 2039, effective, however, on Nov. 1, 1986.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 641 (R.S. §§ 1042, 5296; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 2, 1901, ch. 814, 31 Stat. 956; May 24, 1935, ch. 142, 49 Stat. 289; June 29, 1940, ch. 449, § 4, 54 Stat. 692; July 10, 1946, ch. 547, 60 Stat. 524, 525).

Words "for violation of any law of the United States by any court established by enactment of Congress," were substituted at beginning of section for "by any court of the United States", to make clear that this section extends to the territories and possessions as well as within the continental United States and the District of Columbia. The act of June 29, 1940, ch. 449, § 4, 54 Stat. 692 amending R.S. § 5296, inadvertently omitted the provision of the act of May 24, 1935, ch. 142, 49 Stat. 289, which extended the application of the section to Alaska. The revised section repairs this omission and gives legislative sanction to an administrative construction which has continued the application of the statute to cases arising in Alaska.

The words in parentheses naming the State where oath is administered were deleted as unnecessary and misleading since the law of the place where the property has its situs is controlling as to exemptions.

Minor changes of phraseology were also made.

Effective Date of 1984 Amendment. Amendment of this section by section 3 of Pub.L. 98–596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98–596 set out as a note under section 1 of this title.

§ 3570. Presidential remission as affecting unremitted part

Whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President's remission in whole or in part of

either kind shall not impair the legal validity of the other kind, or of any portion of either kind, not remitted.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 568, 723 (Mar. 4, 1909, ch. 321, § 327, 35 Stat. 1151; June 25, 1910, ch. 387, § 10, 36 Stat. 821).

Words "pardon or" before "remit" and "pardoned or" before "remitted", were omitted as unnecessary in view of the pardoning power of the President under Const. Art. 2, § 2, cl. 1. "The power of the President is not subject to legislative control." Ex parte Gerland, 1866, 4 Wall. 380. (See also notes of decisions, note 5, U.S.C.A. Const. Art. 2, § 2, cl. 1.)

§ 3571.[1] Clerical mistakes—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Court empowered to correct clerical mistakes in judgments, orders, or record, Rule 36.

[1] Another section 3571 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3572.[1] Correction or reduction of sentence—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Court empowered to correct or reduce sentence; time; Rule 35.

[1] Another section 3572 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3573.[1] Arrest or setting aside of judgment—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Arrest of judgment, grounds and motion, time, Rule 34.

Setting aside judgment and permitting withdrawal of plea of guilty, Rule 32(d).

[1] Another section 3573 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3574.[1] Stay of execution; supersedeas—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Death or imprisonment sentence, fines stayed on appeal; conditions and power of court, Rule 38(a).

[1] Another section 3574 is set out in another chapter 227 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3575. Increased sentence for dangerous special offenders

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and

counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(e) A defendant is a special offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655),

and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

(Added Pub.L. 91–452, Title X, § 1001(a), Oct. 15, 1970, 84 Stat. 948.)

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

References in Text. Section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), referred to in subsec. (e), is classified to section 206(a)(1) of Title 29, U.S.C.A., Labor.

§ 3576. Review of sentence

With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

(Added Pub.L. 91–452, Title X, § 1001(a), Oct. 15, 1970, 84 Stat. 950.)

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

§ 3577. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

(Added Pub.L. 91–452, Title X, § 1001(a), Oct. 15, 1970, 84 Stat. 951.)

Renumbering of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3661 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

§ 3578. Conviction records

(a) The Attorney General of the United States is authorized to establish in the Department of Justice a repository for records of convictions and determinations of the validity of such convictions.

(b) Upon the conviction thereafter of a defendant in a court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court shall cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe.

(c) Records maintained in the repository shall not be public records. Certified copies thereof—

(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency, or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe; and

(3) shall be prima facie evidence in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof, that the convictions occurred and whether they have been judicially determined to be invalid on collateral review.

(d) The Attorney General of the United States shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations under this section.

(Added Pub.L. 91–452, Title X, § 1001(a), Oct. 15, 1970, 84 Stat. 951.)

Renumbering of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3662 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

§ 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

(Added Pub.L. 97-291, § 5(a), Oct. 12, 1982, 96 Stat. 1253, and amended Pub.L. 98-596, § 9, Oct. 30, 1984, 98 Stat. 3138.)

Renumbering of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3663 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

References in Text. Section 902 of the Federal Aviation Act of 1958, referred to in subsec. (a)(1), is classified to section 1472 of Title 49, U.S.C.A., Transportation.

Effective Date of 1984 Amendment. Amendment of this section by section 9 of Pub.L. 98-596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98-596 set out as a note under section 1 of this title.

Effective Date. Section effective with respect to offenses occurring after Jan. 1, 1983, pursuant to section 9(b)(2) of Pub.L. 97-291.

Profit by a Criminal from Sale of His Story. Section 7 of Pub.L. 97-291 provided that: "Within one year after the date of enactment of this Act [Oct. 12, 1982], the Attorney General shall report to Congress regarding any laws that are necessary to ensure that no Federal felon derives any profit from the sale of the recollections, thoughts, and feelings of such felon with regards to the offense committed by the felon until any victim of the offense receives restitution."

§ 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability

of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(Added Pub.L. 97-291, § 5(a), Oct. 12, 1982, 96 Stat. 1255.)

Renumbering of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3664 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Effective Date. Section effective with respect to offenses occurring after Jan. 1, 1983, pursuant to section 9(b)(2) of Pub.L. 97-291.

[CHAPTER 228—REPEALED]

Codification. A chapter 228 entitled "IMPOSITION, PAYMENT, AND COLLECTION OF FINES", consisting of sections 3591 to 3599, was enacted by Pub.L. 98-473, Title II, § 238(a), Oct. 12, 1984, 98 Stat. 2034, to be effective, pursuant to section 235 of Pub.L. 98-473, on Nov. 1, 1986. However, that chapter was repealed by Pub.L. 98-596, § 12(a)(1), Oct. 30, 1984, 98 Stat. 3139, which repeal, pursuant to section 12(b) of Pub.L. 98-596, was effective on Oct. 12, 1984. The chapter 228, which was to have gone into effect on Nov. 1, 1986, but for the repeal by section 12(a)(1) of Pub.L. 98-596, read as follows:

§ 3591. Imposition of a fine

(a) Factors to be considered in imposing a fine.—The court, in determining whether to impose a fine, the amount of any fine, the time for payment, and the method of payment, shall consider—

(1) the ability of the defendant to pay the fine in view of the income of the defendant, earning capacity and financial resources, and, if the defendant is an organization, the size of the organization;

(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent on the defendant, relative to the burden which alternative punishments would impose;

(3) any restitution or reparation made by the defendant in connection with the offense and any obligation imposed upon the defendant to make such restitution or reparation;

(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to ensure against a recurrence of such an offense; and

(5) any other pertinent consideration.

(b) Effect of finality of judgment.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

(1) modified or remitted pursuant to the provisions of section 3592;

(2) corrected pursuant to the provisions of rule 35; or

(3) appealed;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

§ 3592. Payment of a fine, delinquency and default

(a) Time and method of payment.—Payment of a fine is due immediately unless the court, at the time of sentencing—

(1) requires payment by a date certain; or

(2) establishes an installment schedule, the specific terms of which shall be fixed by the court.

(b) Individual responsibilities for payment.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(c) Responsibility to provide current address.—At the time of imposition of the fine, the court shall order the person fined to provide the Attorney General with a current mailing address for the entire period that any part of the fine remains unpaid. Failure to provide the Attorney General with a current address or a change in address shall be punishable as a contempt of court.

(d) Stay of fine pending appeal.—Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay—

(1) a requirement that the defendant, pending appeal, deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

(e) Delinquent fine.—A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

(f) Default.—A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due within thirty days of notification of the default, notwithstanding any installment schedule.

§ 3593. Modification or remission of fine

(a) Petition for modification or remission.—A person who has been sentenced to pay a fine, and who—

(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for—

(A) an extension of the installment schedule, not to exceed two years except in case of incarceration or special circumstances; or

(B) a remission of all or part of the unpaid portion including interest and penalties; or

(2) has voluntarily made restitution or reparation to the victim of the offense, may at any time petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

Any petition filed pursuant to this subsection shall be filed in the court in which sentence was originally imposed, unless that court transfers jurisdiction to another court. The petitioner shall notify the Attorney General that the petition has been filed within ten working days after filing. For the purposes of clause (1), unless exceptional circumstances exist, a person may be considered to have made a good faith effort to comply with the terms of the sentence only after payment of a reasonable portion of the fine.

(b) Order of modification or remission.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order, in which case it shall provide the Attorney General with a copy of such order.

§ 3594. Certification and notification

(a) Disposition of payment.—The clerk shall forward each fine payment to the United States Treasury and shall notify the Attorney General of its receipt within ten working days.

(b) Certification of imposition.—If a fine exceeding $100 is imposed, modified, or remitted, the sentencing court shall incorporate in the order imposing, remitting, and modifying such fine, and promptly certify to the Attorney General—

(1) the name of the person fined;

(2) his current address;

(3) the docket number of the case;

(4) the amount of the fine imposed;

(5) any installment schedule;

(6) the nature of any modification or remission of the fine or installment schedule; and

(7) the amount of the fine that is due and unpaid.

(c) Responsibility for collection.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a).

(d) Notification of delinquency.—Within ten working days after a fine is determined to be delinquent as provided in section 3592(e), the Attorney General shall notify the person whose fine is delinquent, by certified mail, to inform him that the fine is delinquent.

(e) Notification of default.—Within ten working days after a fine is determined to be in default as provided in section 3592(f), the Attorney General shall notify the person defaulting, by certified mail, to inform him that the fine is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.

§ 3595. Interest, monetary penalties for delinquency, and default

Upon a determination of willful nonpayment, the court may impose the following interest and monetary penalties:

(1) Interest.—Notwithstanding any other provision of law, interest at the rate of 1 per centum per month, or 12 per centum per year, shall be charged, beginning the thirty-first day after sentencing on the first day of each month during which any fine balance remains unpaid, including sums to be paid pursuant to an installment schedule.

(2) Monetary penalties for delinquent fines.—Notwithstanding any other provision of law, a penalty sum equal to 10 per centum shall be charged for any portion of a criminal fine which has become delinquent. The Attorney General may waive all or part of the penalty for good cause.

§ 3596. Civil remedies for satisfaction of an unpaid fine

(a) Lien.—A fine imposed as a sentence is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b).

On application of the person fined, the Attorney General shall—

(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property

remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

(b) Expiration of lien.—A lien becomes unenforceable at the time liability to pay a fine expires as provided in section 3598.

(c) Application of other lien provisions.—The provisions of sections 6323, 6331, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940 (54 Stat. 1190), apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to "the Secretary" shall be construed to mean "the Attorney General," and references in those sections to "tax" shall be construed to mean "fine."

(d) Effect on notice of lien.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

(e) Alternative enforcement.—Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases.

(f) Discharge of debts inapplicable.—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.

§ 3597. Resentencing upon failure to pay a fine

(a) Resentencing.—Subject to the provisions of subsection (b), if a person knowingly fails to pay a delinquent fine the court may resentence the person to any sentence which might originally have been imposed.

(b) Imprisonment.—The defendant may be sentenced to a term of imprisonment under subsection (a) only if the court determines that—

(1) the person willfully refused to pay the delinquent fine or had failed to make sufficient bona fine efforts to pay the fine; or

(2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

§ 3598. Statute of limitations

(a) Liability to pay a fine expires.—

(1) twenty years after the entry of the judgment;

(2) upon the death of the person fined.

(b) The period set forth in subsection (a) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in subsection (a) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940 (54 Stat. 1190).

§ 3599. Criminal default

Whoever, having been sentenced to pay a fine, willfully fails to pay the fine, shall be fined not more than twice the amount of the unpaid balance of the fine or $10,000, whichever is greater, imprisoned not more than one year, or both.

CHAPTER 229[1]—POSTSENTENCE ADMINISTRATION

Subchapter
A. Probation 3601
B. Fines 3611
C. Imprisonment 3621

[1] Another chapter 229 (§§ 3611 to 3620), which is currently effective is set out post.

Effective Date of Chapter

Section 235(a)(1) of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, provided that the addition of this chapter 229 shall be effective on Nov. 1, 1986, except that the provisions of section 3624 shall not be effective until the day after (I) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to section 235(a)(1)(B)(i) of Pub.L. 98-473, along with a report stating the reasons for the Commission's recommendations; (II) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within one hundred and fifty days of submission of the guidelines, reported to the Congress the results of its study; and (III) the Congress has had six months after the date described in subclause (I) in which to examine the guidelines and consider the reports. For text of section 235 of Pub.L. 98-473, see Effective Date note under section 3551 of this title.

SUBCHAPTER A—PROBATION

Sec.
3601. Supervision of probation.
3602. Appointment of probation officers.
3603. Duties of probation officers.
3604. Transportation of a probationer.
3605. Transfer of jurisdiction over a probationer.
3606. Arrest and return of a probationer.
3607. Special probation and expungement procedures for drug possessor.

SUBCHAPTER A—PROBATION

§ 3601. Supervision of probation

A person who has been sentenced to probation pursuant to the provisions of subchapter B of chapter 227, or placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3602. Appointment of probation officers

(a) Appointment.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation, and may, in its discretion, remove a probation officer appointed to serve without compensation.

(b) Record of appointment.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

(c) Chief probation officer.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3603. Duties of probation officers

A probation officer shall—

(a) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

(b) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

(c) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;

(d) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;

(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

(f) upon request of the Attorney General or his designee, supervise and furnish information about a person within the custody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3624(c);

(g) keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision and report thereon to the court placing such person on probation and report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked; and

(h) perform any other duty that the court may designate.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2002.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3604. Transportation of a probationer

A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with—

(a) transportation to the place to which he is required to proceed as a condition of his probation; and

(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2002.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3605. Transfer of jurisdiction over a probationer

A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer or releasee that are permitted by this subchapter or subchapter B or D of chapter 227.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2003.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3606. Arrest and return of a probationer

If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2003.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3607. Special probation and expungement procedures for drug possessors

(a) Pre-judgment probation.—If a person found guilty of an offense described n section 404 of the Controlled Substances Act (21 U.S.C. 844)—

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) Record of disposition.—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceedings whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) Expungement of record of disposition.—If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be ex-

punged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2003.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

SUBCHAPTER B—FINES

Sec.
3611. Payment of a fine.
3612. Collection of an unpaid fine.
3613. Civil remedies for satisfaction of an unpaid fine.
3614. Resentencing upon failure to pay a fine.
3615. Criminal default.

SUBCHAPTER B—FINES

§ 3611.[1] Payment of a fine

A person who has been sentenced to pay a fine pursuant to the provisions of subchapter C of chapter 227 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2004.)

[1] Another section 3611 is set out in chapter 229 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3612.[1] Collection of an unpaid fine

(a) Disposition of payment.—The clerk shall forward each fine payment to the United States Treasury and shall notify the Attorney General of its receipt within ten working days.

(b) Certification of imposition.—If a fine exceeding $100 is imposed, modified, or remitted, the sentencing court shall incorporate in the order imposing, remitting, or modifying such fine, and promptly certify to the Attorney General—

(1) the name of the person fined;

(2) his current address;

(3) the docket number of the case;

(4) the amount of the fine imposed;

(5) any installment schedule;

(6) the nature of any modification or remission of the fine or installment schedule; and

(7) the amount of the fine that is due and unpaid.

(c) Responsibility for collection.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (b). An order of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

(d) Notification of delinquency.—Within ten working days after a fine is determined to be delinquent as provided in section 3572(i), the Attorney General shall notify the person whose fine is delinquent, by certified mail, to inform him that the fine is delinquent.

(e) Notification of default.—Within ten working days after a fine is determined to be in default as provided in section 3572(j), the Attorney General shall notify the person defaulting, by certified mail, to inform him that the fine is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.

(f) Interest, monetary penalties for delinquency, and default.—Upon a determination of willful nonpayment, the court may impose the following interest and monetary penalties:

(1) Interest.—Notwithstanding any other provision of law, interest at the rate of 1 per centum per month, or 12 per centum per year, shall be charged, beginning the thirty-first day after sentencing on the first day of each month during which any fine balance remains unpaid, including sums to be paid pursuant to an installment schedule.

(2) Monetary penalties for delinquent fines.—Notwithstanding any other provision of law, a

penalty sum equal to 10 per centum shall be charged for any portion of a criminal fine which has become delinquent. The Attorney General may waive all or part of the penalty for good cause.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2004.)

[1] Another section 3612 is set out in chapter 229 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

Notice to Pay Fine in Full or by Installment. Section 237 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2033, provided:

"(a)(1) Except as provided in paragraph (2), for each criminal fine for which the unpaid balance exceeds $100 as of the effective date of this Act [see section 235 of Pub.L. 98–473 set out as a note under section 3551 of this title], the Attorney General shall, within one hundred and twenty days, notify the person by certified mail of his obligation, within thirty days after notification, to—

"(A) pay the fine in full;

"(B) specify, and demonstrate compliance with, an installment schedule established by a court before enactment of the amendments made by this Act, [the Sentencing Reform Act of 1984 (Pub.L. 98–473, Title II, c. II)], specifying the dates on which designated partial payments will be made; or

"(C) establish with the concurrence of the Attorney General, a new installment schedule of a duration not exceeding two years, except in special circumstances, and specifying the dates on which designated partial payments will be made.

"(2) This subsection shall not apply in cases in which—

"(A) the Attorney General believes the likelihood of collection is remote; or

"(B) criminal fines have been stayed pending appeal.

"(b) The Attorney General shall, within one hundred and eighty days after the effective date of this Act, declare all fines for which this obligation is unfulfilled to be in criminal default, subject to the civil and criminal remedies established by amendments made by this Act. No interest or monetary penalties shall be charged on any fines subject to this section.

"(c) Not later than one year following the effective date of this Act, the Attorney General shall include in the annual crime report steps taken to implement this Act and the progress achieved in criminal fine collection, including collection data for each judicial district."

§ 3613.[1] Civil remedies for satisfaction of an unpaid fine

(a) Lien.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(1) of the Internal Revenue Code; or

(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

(b) Expiration of lien.—A lien becomes unenforceable and liability to pay a fine expires—

(1) twenty years after the entry of the judgment; or

(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

(c) Application of other lien provisions.—The provisions of sections 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to "the Secretary" shall be construed to mean "the Attorney General," and references in those sections to "tax" shall be construed to mean "fine."

(d) Effect of notice of lien.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The regis-

tration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

(e) Alternative enforcement.—Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases, but in no event shall liability for payment of a fine extend beyond the period specified in subsection (b).

(f) Discharge of debts inapplicable.—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2005.)

[1] Another section 3613 is set out in chapter 229 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3614.[1] Resentencing upon failure to pay a fine

(a) Resentencing.—Subject to the provisions of subsection (b), if a defendant knowingly fails to pay a delinquent fine the court may resentence the defendant to any sentence which might originally have been imposed.

(b) Imprisonment.—The defendant may be sentenced to a term of imprisonment under subsection (a) only if the court determines that—

(1) the defendant willfully refused to pay the delinquent fine or had failed to make sufficient bona fide efforts to pay the fine; or

(2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2006.)

[1] Another section 3614 is set out in chapter 229 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3615.[1] Criminal default

Whoever, having been sentenced to pay a fine, willfully fails to pay the fine, shall be fined not more than twice the amount of the unpaid balance of the fine or $10,000, whichever is greater, imprisoned not more than one year, or both.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2006.)

[1] Another section 3615 is set out in chapter 229 post.

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

SUBCHAPTER C—IMPRISONMENT

Sec.
3621. Imprisonment of a convicted person.
3622. Temporary release of a prisoner.
3623. Transfer of a prisoner to State authority.
3624. Release of a prisoner.
3625. Inapplicability of the Administrative Procedure Act.

SUBCHAPTER C—IMPRISONMENT

§ 3621. Imprisonment of a convicted person

(a) Commitment to custody of Bureau of Prisons.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) Place of imprisonment.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

(c) Delivery of order of commitment.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

(d) Delivery of prisoner for court appearances.—The United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2007.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3622. Temporary release of a prisoner

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2007.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3623. Transfer of a prisoner to State authority

The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if—

(1) the transfer has been requested by the Governor or other executive authority of the State;

(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2008.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

§ 3624. Release of a prisoner

(a) Date of release.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) Credit toward service of sentence for satisfactory behavior.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(c) Pre-release custody.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) Allotment of clothing, funds, and transportation.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) Supervision after release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with the conviction for a Federal, State, or local crime. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2008.)

Effective Date. For effective date of this section, see Effective Date note set out under section 3551 of this title.

§ 3625. Inapplicability of the Administrative Procedure Act

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

(Added Pub.L. 98–473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2010.)

Effective Date. See section 235(a)(1) of Pub.L. 98–473 set out preceding section 3601 of this chapter.

CHAPTER 229[1]—FINES, PENALTIES AND FORFEITURES

Sec.

3611. Firearms possessed by convicted felons.
3612. Bribe moneys.
3613. Fines for setting grass and timber fires.
3614. Fine for seduction.
3615. Liquors and related property; definitions.
[3616. Repealed.]
3617. Remission or mitigation of forfeitures under liquor laws; possession pending trial.
3618. Conveyances carrying liquor.
3619. Disposition of conveyances seized for violation of the Indian liquor laws.
3620. Vessels carrying explosives and steerage passengers.
3621. Criminal default on fine.
3622. Factors relating to imposition of fines.

Sec.
3623. Alternative fines.
3624. Security for stayed fine.

[1] Another chapter 229 (§§ 3601 to 3607, 3611 to 3615, 3621 to 3625), effective Nov. 1, 1986, is set out ante.

Repeal and Renumbering of Chapter

Pub.L. 98-473, Title II, c. II, § 212(a)(1), (2), Oct. 12, 1984, 98 Stat. 1987, repealed this chapter and renumbered sections 3611, 3612, 3615, and 3617 to 3620 as sections 3665 to 3671 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Effective Date of 1984 Amendment. Addition of items 3621 to 3624 by section 6(b) of Pub.L. 98-596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98-596 set out as a note under section 1 of this title.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3611 [1]. Firearms possessed by convicted felons

A judgment of conviction for transporting a stolen motor vehicle in interstate or foreign commerce or for committing or attempting to commit a felony in violation of any law of the United States involving the use of threats, force, or violence or perpetrated in whole or in part by the use of firearms, may, in addition to the penalty provided by law for such offense, order the confiscation and disposal of firearms and ammunition found in the possession or under the immediate control of the defendant at the time of his arrest.

The court may direct the delivery of such firearms or ammunition to the law-enforcement agency which apprehended such person, for its use or for any other disposition in its discretion.

[1] Another section 3611 is set out in chapter 229 ante.

Renumbering of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3665 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 645 (June 13, 1939, ch. 197, 53 Stat. 814).

The condensation and simplification of this section clarifies its intent to confiscate the firearms taken from persons convicted of crimes of violence without any real change of substance.

Short Title of 1984 Amendment. Section 1 of Pub.L. 98-596, Oct. 30, 1984, 98 Stat. 3134, provided: "this Act [Pub.L. 98-596] may be cited as the Criminal Fine Enforcement Act of 1984."

§ 3612 [1]. Bribe moneys

Moneys received or tendered in evidence in any United States Court, or before any officer thereof, which have been paid to or received by any official as a bribe, shall, after the final disposition of the case, proceeding or investigation, be deposited in the registry of the court to be disposed of in accordance with the order of the court, to be subject, however, to the provisions of section 2042 of Title 28.

(As amended May 24, 1949, c. 139, § 55, 63 Stat. 96.)

[1] Another section 3612 is set out in chapter 229 ante.

Renumbering of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3666 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 570 (Jan. 7, 1925, ch. 33, 43 Stat. 726).

Changes were made in phraseology.

1949 ACT

This section [section 55] corrects section 3612 of title 18, U.S.C., so that the reference in such section will be to the correct section number in title 28, U.S.C., as revised and enacted in 1948.

Notice to Pay Fine in Full or by Installment. Section 237 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2033, provided:

"(a)(1) Except as provided in paragraph (2), for each criminal fine for which the unpaid balance exceeds $100 as of the effective date of this Act [see section 235 of Pub.L. 98-473 set out as a note under section 3551 of this title], the Attorney General shall, within one hundred and twenty days, notify the person by certified mail of his obligation, within thirty days after notification, to—

"(A) pay the fine in full;

"(B) specify, and demonstrate compliance with, an installment schedule established by a court before enactment of the amendments made by this Act, [the Sentencing Reform Act of 1984 (Pub.L. 98-473, Title II, c. II)], specifying the dates on which designated partial payments will be made; or

"(C) establish with the concurrence of the Attorney General, a new installment schedule of a duration not exceeding two years, except in special circumstances, and specifying the dates on which designated partial payments will be made.

"(2) This subsection shall not apply in cases in which—

"(A) the Attorney General believes the likelihood of collection is remote; or

"(B) criminal fines have been stayed pending appeal.

"(b) The Attorney General shall, within one hundred and eighty days after the effective date of this Act, declare all fines for which this obligation is unfulfilled to

be in criminal default, subject to the civil and criminal remedies established by amendments made by this Act. No interest or monetary penalties shall be charged on any fines subject to this section.

"(c) Not later than one year following the effective date of this Act, the Attorney General shall include in the annual crime report steps taken to implement this Act and the progress achieved in criminal fine collection, including collection data for each judicial district."

§ 3613 [1]. Fines for setting grass and timber fires

In all cases arising under sections 1855 and 1856 of this title the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situated.

[1] Another section 3613 is set out in chapter 229 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 108 (Mar. 4, 1909, ch. 321, § 54, 35 Stat. 1099).

§ 3614 [1]. Fine for seduction

When a person is convicted of a violation of section 2198 of this title and fined, the court may direct that the amount of the fine, when paid, be paid for the use of the female seduced, or her child, if she have any.

[1] Another section 3614 is set out in chapter 229 ante.

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 460 (Mar. 4, 1909, ch. 321, § 281, 35 Stat. 1144).

Other provisions of said section 460 of title 18, U.S.C., 1940 ed., were incorporated in sections 2198 and 3286 of this title.

§ 3615 [1]. Liquors and related property; definitions

All liquor involved in any violation of sections 1261–1265 of this title, the containers of such liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited and such property or its proceeds disposed of in accordance with the laws relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws.

As used in this section, "vessel" includes every description of watercraft used, or capable of being used, as a means of transportation in water or in water and air; "vehicle" includes animals and every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air.

[1] Another section 3615 is set out in chapter 229 ante.

Renumbering of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3667 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Historical and Revision Notes

Based on sections 222 and 224 of title 27, U.S.C., 1940 ed., Intoxicating Liquors (June 25, 1936, ch. 815, §§ 2, 4, 49 Stat. 1928).

Section consolidates sections 222 and 224 of title 27, U.S.C., 1940 ed., with changes in phraseology and arrangement necessary to effect the consolidation. Said section 222 is also incorporated in section 1262 of this title.

Definition of "State" in section 222 of title 27 U.S.C., 1940 ed., as meaning and including "every State, Territory, and Possession of the United States," was omitted because the words "Territory, District," and so forth, appear after "State" in sections 1262, 1265, of this title, which are the only sections in chapter 59, constituting sections 1261–1265 of this title, to which such definition would have been applicable.

Changes made in phraseology.

[§ 3616. Repealed. Pub.L. 91-513, Title III, § 1101(b)(2)(A), Oct. 27, 1970, 84 Stat. 1292]

§ 3617. Remission or mitigation of forfeitures under liquor laws; possession pending trial

(a) Jurisdiction of court

Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

(b) Conditions precedent to remission or mitigation

In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any

State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

(c) Claimants first entitled to delivery

Upon the request of any claimant whose claim for remission or mitigation is allowed and whose interest is first in the order of priority among such claims allowed in such proceeding and is of an amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to him; and, upon the joint request of any two or more claimants whose claims are allowed and whose interests are not subject to any prior or intervening interests claimed and allowed in such proceedings, and are of a total amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to such of the joint requesting claimants as is designated in such request. Such return shall be made only upon payment of all expenses incident to the seizure and forfeiture incurred by the United States. In all other cases the court shall order disposition of such vehicle or aircraft as provided in sections 304f–304m of Title 40, and if such disposition be by public sale, payment from the proceeds thereof, after satisfaction of all such expenses, of any such claim in its order of priority among the claims allowed in such proceedings.

(d) Delivery on bond pending trial

In any proceeding in court for the forfeiture under the internal-revenue laws of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquor, the court shall order delivery thereof to any claimant who shall establish his right to the immediate possession thereof, and shall execute, with one or more sureties approved by the court, and deliver to the court, a bond to the United States for the payment of a sum equal to the appraised value of such vehicle or aircraft. Such bond shall be conditioned to return such vehicle or aircraft at the time of the trial and to pay the difference between the appraised value of such vehicle or aircraft as of the time it shall have been so released on bond and the appraised value thereof as of the time of trial; and conditioned further that, if the vehicle or aircraft be not returned at the time of trial, the bond shall stand in lieu of, and be forfeited in the same manner as, such vehicle or aircraft. Notwithstanding this subsection or any other provisions of law relating to the delivery of possession on bond of vehicles or aircraft sought to be forfeited under the internal-revenue laws, the court may, in its discretion and upon good cause shown by the United States, refuse to order such delivery of possession.

Renumbering of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3668 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 646 (Aug. 27, 1935, ch. 740, § 204, 49 Stat. 878).

A minor change was made in phraseology.

§ 3618. Conveyances carrying liquor

Any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel, and forfeiture.

Renumbering of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3669 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

HISTORICAL AND REVISION NOTES

Based on section 247 of title 25, U.S.C., 1940 ed., Indians (Mar. 2, 1917, ch. 146, § 1, 39 Stat. 970).

Words "Automobiles or any other vehicles or" at beginning of section were omitted, and "any conveyance" substituted to remove possible ambiguity as to scope of section.

Words at conclusion of section "provided in section 246 of this title" added nothing and were therefore omitted. (See also rule 41 of the Federal Rules of Criminal Procedure.)

Minor changes were made in arrangement and phraseology.

§ 3619. Disposition of conveyances seized for violation of the Indian liquor laws

The provisions of section 3617 of this title shall apply to any conveyances seized, proceeded against by libel, or forfeited under the provisions of section 3113 or 3618 of this title for having been used in introducing or attempting to introduce intoxicants into the Indian country or into other places where such introduction is prohibited by treaty or enactment of Congress.

(Added Oct. 24, 1951, c. 546, § 2, 65 Stat. 609.)

Amendment of Section

Pub.L. 98-473, Title II, §§ 223(k), 235, Oct. 12, 1984, 98 Stat. 2029, 2031, provided that, effective Nov. 1, 1986, this section (which will be renumbered 3670) is amended by deleting "3617" and "3618" and substituting "3668" and "3669", respectively.

Renumbering of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3670 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3620. Vessels carrying explosives and steerage passengers

The amount of any fine imposed upon the master of a steamship or other vessel under the provisions of section 2278 of this title shall be a lien upon such vessel, and such vessel may be libeled therefor in the district court of the United States for any district in which such vessel shall arrive or from which it shall depart.

(Added Sept. 3, 1954, c. 1263, § 36, 68 Stat. 1239.)

Renumbering of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3671 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3621. Criminal default on fine

(a) Whoever, having been sentenced to pay a fine or penalty, willfully does not pay an amount due—

(1) in the case of an individual, shall be fined not more than the greater of $100,000 or twice the unpaid balance of the fine or penalty, or imprisoned not more than one year, or both; and

(2) in the case of a person other than an individual, shall be fined not more than the greater of $250,000 or twice the unpaid balance of the fine or penalty.

(b) It is a defense to a prosecution under subsection (a)(1) of this section that the individual was unable to make the payment because of such individual's responsibility to provide necessities for such individual or other individuals financially dependent upon such individual. The defendant has the burden of establishing the defense under this subsection by a preponderance of the evidence.

(Added Pub.L. 98-596, § 6(a), Oct. 30, 1984, 98 Stat. 3136.)

Repeal of Chapter

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed chapter 229 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Effective Date. Addition of this section by section 6(a) of Pub.L. 98-596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98-596 set out as a note under section 1 of this title.

§ 3622. Factors relating to imposition of fines

(a) In determining whether to impose a fine and the amount of a fine, the court shall consider, in addition to other relevant factors—

(1) the nature and circumstances of the offense;

(2) the history and characteristics of the defendant;

(3) the defendant's income, earning capacity, and financial resources;

(4) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(5) any pecuniary loss inflicted upon others as a result of the offense;

(6) whether restitution is ordered and the amount of such restitution;

(7) the need to deprive the defendant of illegally obtained gains from the offense;

(8) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(9) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

(Added Pub.L. 98-596, § 6(a), Oct. 30, 1984, 98 Stat. 3136.)

Repeal of Chapter

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed chapter 229 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Effective Date. Addition of this section by section 6(a) of Pub.L. 98-596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98-596 set out as a note under section 1 of this title.

§ 3623. Alternative fines

(a) An individual convicted of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (c) of this section;

(3) in the case of a felony, $250,000;

(4) in the case of a misdemeanor resulting in death, $250,000; or

(5) in the case of a misdemeanor punishable by imprisonment for more than six months, $100,000.

(b) A person (other than an individual) convicted of an offense may be fined not more than the greatest of—

(1) the amount specified in the law setting forth the offense;

(2) the applicable amount under subsection (c) of this section;

(3) in the case of a felony, $500,000;

(4) in the case of a misdemeanor resulting in death, $500,000; or

(5) in the case of a misdemeanor punishable by imprisonment for more than six months, $100,000.

(c)(1) If the defendant derives pecuniary gain from the offense, or if the offense results in pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(2) Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

(Added Pub.L. 98-596, § 6(a), Oct. 30, 1984, 98 Stat. 3137.)

Repeal of Chapter

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed chapter 229 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Effective Date. Addition of this section by section 6(a) of Pub.L. 98-596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98-596 set out as a note under section 1 of this title.

§ 3624. Security for stayed fine

If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)—

(1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;

(2) require the defendant to provide a bond or other security to ensure payment of the fine; or

(3) restrain the defendant from transferring or dissipating assets.

(Added Pub.L. 98-596, § 6(a), Oct. 30, 1984, 98 Stat. 3138.)

Repeal of Chapter

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed chapter 229 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

Effective Date. Addition of this section by section 6(a) of Pub.L. 98-596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98-596 set out as a note under section 1 of this title.

CHAPTER 231—PROBATION

Sec.
3651. Suspension of sentence and probation.
3652. Probation—Rule.
3653. Report of probation officer and arrest of probationer.
3654. Appointment and removal of probation officers.
3655. Duties of probation officers.
3656. Duties of Director of Administrative Office of the United States Courts.

Repeal and Renumbering of Chapter

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this chapter and renumbered section 3656 as 3672 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

§ 3651. Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as

well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: *Provided*, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

The defendant's liability for any punishment (other than a fine) imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. If at the end of the period of probation, the defendant has not complied with a condition of probation, the court may nevertheless terminate proceedings against the defendant, but no such termination shall affect the defendant's obligation to pay a fine imposed or made a condition of probation, and such fine shall be collected in the manner provided in section 3565 of this title.

(As amended June 20, 1958, Pub.L. 85–463, § 1, 72 Stat. 216; Aug. 23, 1958, Pub.L. 85–741, 72 Stat. 834; Oct. 22, 1970, Pub.L. 91–492, § 1, 84 Stat. 1090; May 11, 1972, Pub.L. 92–293, § 1, 86 Stat. 136; Oct. 27, 1978, Pub.L. 95–537, § 2, 92 Stat. 2038; Oct. 30, 1984, Pub.L. 98–596, § 4, 98 Stat. 3136.)

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Amendment of Section

Pub.L. 98–473, Title II, §§ 235, 238(b), (c), Oct. 12, 1984, 98 Stat. 2031, 2038, provided that, effective Nov. 1, 1986, this section is amended:

(1) by inserting after "May be required to provide for the support of any persons, for whose support he is legally responsible." the following new paragraph:

"If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to

the court-established installment schedule shall be a condition of the probation." and

(2) by striking out the last paragraph which read: "The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation." and inserting in lieu thereof the following:

"The defendant's liability for any unexecuted fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.".

See Codification note below.

Codification. Pub.L. 98–596, § 12(a)(2), (3), Oct. 30, 1984, 98 Stat. 3139, struck out the two paragraphs which had been added by Pub.L. 98–473 and restored the paragraph which Pub.L. 98–473 had deleted (see Amendment of Section note above), effective Oct. 12, 1984, pursuant to section 12(b) of Pub.L. 98–596. This amendment was not executed to text since the identical language was presently in text. The amendment was a probable attempt to restore the text of section 3651 which was amended by Pub.L. 98–473, Title II, c. II, § 238(b), (c), Oct. 12, 1984, 98 Stat. 2038, effective, however, on Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 724 (Mar. 4, 1925, ch. 521, § 1, 43 Stat. 1259).

The phrase "any court having jurisdiction to try offenses against the United States" was substituted for "the courts of the United States" with the approval of the Department of Justice and the Director of the Administrative Office of the United States Courts in order to make clear the legislative intent of Congress that the probation system is available for the rehabilitation of Federal offenders in the Territories and Possessions as well as in the continental United States.

Words "after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment" were omitted from first sentence as unnecessary.

Words "or the court may impose or fine and may also place the defendant upon probation in the manner aforesaid." were also omitted from the first sentence. The second paragraph of this revised section was substituted to clarify and define accurately the limitation upon suspension of fine or imprisonment, and probation. It reflects exactly the practice followed by Federal courts.

The third and fourth paragraphs of the revised section incorporate the last two sentences from the original first paragraph.

The fifth paragraph of the revised section incorporates the last paragraph of the original section. Words "and as a condition thereof" were inserted after "While on probation". Words "imposed at the time of being placed on probation" were omitted as surplusage.

The last paragraph of the revised section is new. It insures certainty as to extent of defendant's liability upon fulfilling conditions of probation and is also consistent with the words inserted at the beginning of the fifth paragraph.

Minor changes in arrangement and phraseology were made.

Effective Date of 1984 Amendment. Amendment of this section by section 4 of Pub.L. 98–596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98–596 set out as a note under section 1 of this title.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3652. Probation—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Probation as provided by law, Rule 32(e).

Presentence investigation, Rule 32(c).

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

§ 3653. Report of probation officer and arrest of probationer

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section

3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

(As amended May 24, 1949, c. 139, § 56, 63 Stat. 96.)

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 725 (Mar. 4, 1925, ch., 521, § 2, 43 Stat. 1260; June 16, 1933, ch. 97, 48 Stat. 256).

The section was rewritten with considerable change of phraseology to remove ambiguity in the original enactment under which the serious question was presented whether probation might be revoked for misconduct occurring after the termination of the probation period.

The phrase "within the maximum period for which the defendant might originally have been sentenced" was deleted, and in place thereof was substituted the phrase "or at any time within five years after the expiration of the probation period, for violation of probation occurring during the probation period."

The section as revised removes the possibility that a probationer sentenced on a fifteen count mail fraud indictment would be subject for seventy-five years to the liability of revocation of probation.

The suggestion was made that the word "probationer", wherever it appears, be changed to "defendant". In the revised section, however, the word "defendant" which appeared twice in said section 725 of title 18, U.S.C., 1940 ed., was omitted and the word "probationer" was substituted as the more accurately descriptive term.

The last sentence was substituted for "Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." This clarifies the intent of the section in conformity with the opinion in Roberts v. United States (1943, 63 S.Ct. 113, 320 U.S. 264, 88 L.Ed. 41).

1949 ACT

This section [section 56] incorporates in section 3653 of title 18, U.S.C., the provisions of act of June 25, 1948 (ch. 653, 62 Stat. 1016), which became law subsequent to the enactment of title 18. Changes in phraseology have been made.

§ 3654. Appointment and removal of probation officers

Any court having original jurisdiction to try offenses against the United States may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the court making such appointment.

All such probation officers shall serve without compensation except that in case it shall appear to the court that the needs of the service require that there should be salaried probation officers, such court may appoint such officers.

Such court may in its discretion remove a probation officer serving in such court.

The appointment of a probation officer shall be in writing and shall be entered on the records of the court, and a copy of the order of appointment shall be delivered to the officer so appointed and a copy sent to the Director of the Administrative Office of the United States Courts.

Whenever such court shall have appointed more than one probation officer, one may be designated chief probation officer and shall direct the work of all probation officers serving in such court.

(As amended Aug. 2, 1949, c. 383, § 2, 63 Stat. 491.)

Repeal of Section

Pub.L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98-473.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 726 (Mar. 4, 1925, ch. 521, § 3, 43 Stat. 1260; June 6, 1930, ch. 406, § 1, 46 Stat. 503).

Several minor changes and changes necessary because of later enactments and other developments affecting text matter, were made.

The phrase "any court having original jurisdiction of offenses against the United States" was substituted for "any court of the United States having original jurisdic-

tion of criminal actions" for clarity and to conform with section 3651 of this title. (See reviser's note to said section 3651).

Omitted were the words "The Attorney General shall fix the salaries to be paid probation officers and shall provide for the necessary expenses of probation officers, including clerical service, and expenses for traveling when approved by the court," because of the specific repeal of the 1940 Appropriation Act by section 2 of the act of August 7, 1939, ch. 501, 53 Stat. 1225, relating to Attorney General control and, more important, because Congress has specifically limited the salary of probation and chief probation officers in the annual Legislative and Judiciary Appropriation Acts, to wit, not less than $1,800 nor more than $3,600 per annum. (See, for example, Legislative and Judiciary Appropriation Act of 1943, act of June 28, 1943, ch. 173, title II, § 201, 57 Stat. 242.) The same is true with regard to transportation expenses, etc.; see, ibid., 1943 Appropriation Act. The scale of salaries is now fixed by the Director within the limits of the Appropriation Act. Also omitted from the section were the words "Attorney General" after "a copy sent to" and substituted "Director of the Administrative Office of the United States Courts" because under the authority of the creating act of August 7, 1939, 53 Stat. 1225, the Director established a Probation Service which exercises general supervision of accounts and practices of the Federal probation officers, subject to the primary control by the respective district courts which they serve. (See Annual Report of Director of the Administrative Office of the United States Courts, September 1943, pp. 17–20. See also Report of Director for 1941, pp. 33, 34.)

The word "court" was substituted in several places for "judge or judges" and "court or courts" without change of meaning.

§ 3655. Duties of probation officers

The probation officer shall furnish to each probationer under his supervision a written statement of the conditions of probation and shall instruct him regarding the same.

He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation.

He shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid probationers and to bring about improvements in their conduct and condition.

He shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Director of the Administrative Office of the United States Courts as he may at any time require; and shall perform such other duties as the court may direct.

He shall report to the court any failure of a probationer under his supervision to pay an amount due as a fine or as restitution.

Each probation officer shall perform such duties with respect to persons on parole as the United States Parole Commission shall request.

(As amended March 15, 1976, Pub.L. 94–233, § 14, 90 Stat. 233; Oct. 30, 1984, Pub.L. 98–596, § 5, 98 Stat. 3136.)

Repeal of Section

Pub.L. 98–473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987, repealed this section effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Amendment of Section

Pub.L. 98–473, Title II, §§ 235, 238(d), Oct. 12, 1984, 98 Stat. 2031, 2039, provided that effective Nov. 1, 1986, the second paragraph of this section which read:

"He shall keep informed concerning the conduct and condition of each probationer under his supervision and shall report thereon to the court placing such person on probation."

is amended to read as follows:

"He shall keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision, and shall report thereon to the court placing such person on probation. He shall report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked."

See Codification note below.

Codification. Pub.L. 98–596, § 12(a)(4), Oct. 30, 1984, 98 Stat. 3139, restored the paragraph which Pub.L. 98–473 had amended (see Amendment of Section note above), effective Oct. 12, 1984, pursuant to section 12(b) of Pub.L. 98–596. This amendment was not executed to text since the identical language was presently in text. The amendment was a probable attempt to restore the text of section 3655 which was amended by Pub.L. 98–473, Title II, c. II, § 238(d), Oct. 12, 1984, 98 Stat. 2039, effective, however, on Nov. 1, 1986.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 727 (Mar. 4, 1925, ch. 521, § 4, 43 Stat. 1260; June 6, 1930, ch. 406, § 1, 46, Stat. 503).

A necessary substitution and omission of superseded text matter was made in this section. The first sentence of section 727 of title 18, U.S.C., 1940 ed., making it the duty of the probation officer to investigate and report concerning any case referred to him by the court was omitted as superseded by Rule 32(c)(1) of the Federal

Rules of Criminal Procedure which require presentence investigation in every case unless the court otherwise directs.

The words "Director of the Administrative Office of the United States Courts" were substituted for "Attorney General" where it first appeared. In view of the fact that the Administrative Office now exercises general supervision of the accounts and practices, reports, etc., of probation officers since the enactment of act of August 7, 1939, the Attorney General's previous authority is therefore superseded. (See also reviser's note under section 3654 of this title.)

The reason why no similar substitution of language was made in the next to the last sentence where the words "Attorney General" are mentioned is due to the fact that uniformly since 1939, Congress in the annual legislative and judiciary appropriation acts stipulates that such probation officers shall be under a duty to observe the "official orders of the Attorney General with respect to the supervision and furnishing of information of any prisoner released conditionally on parole." The parole supervision is under the Attorney General while probation is under the Director of the Administrative Office.

Omitted the last sentence reading "A probation officer shall have the power of arrest that is now exercised by a deputy marshal." as superseded by section 3653 of this title.

Other changes of phraseology were made without change of substance.

Effective Date of 1984 Amendment. Amendment of this section by section 5 of Pub.L. 98–596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98–596 set out as a note under section 1 of this title.

§ 3656. Duties of Director of Administrative Office of the United States Courts

The Director of the Administrative Office of the United States Courts, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers.

He shall collect for publication statistical and other information concerning the work of the probation officers.

He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work.

He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts.

He shall, under the supervision and direction of the Judicial Conference of the United States, fix the salaries of probation officers and shall provide for their necessary expenses including clerical service and travel expenses.

He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts.

(As amended May 24, 1949, c. 139, § 57, 63 Stat. 97.)

Renumbering of Section

Pub.L. 98–473, Title II, c. II. § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987, renumbered this section as section 3672 of chapter 232 effective Nov. 1, 1986, pursuant to section 235 of Pub.L. 98–473.

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., § 728 (Mar. 4, 1925, ch. 521, § 4(a), as added June 6, 1930, ch. 406, § 2, 46 Stat. 503).

The only change made in this section was the substitution of the "Director of the Administrative Office of the United States Courts" for "Attorney General". (See reviser's note under section 3654 of this title.)

1949 Act

This amendment [see section 57] conforms the language of section 3656 of title 18, U.S.C., to that of title 28, U.S.C., section 604(a).

CHAPTER 232[1]—MISCELLANEOUS SENTENCING PROVISIONS

Sec.
3661. Use of information for sentencing.
3662. Conviction records.
3663. Order of restitution.
3664. Procedure for issuing order of restitution.
3665. Firearms possessed by convicted felons.
3666. Bribe moneys.
3667. Liquors and related property; definitions.
3668. Remission or mitigation of forfeitures under liquor laws; possession pending trial.
3669. Conveyance carrying liquor.
3670. Disposition of conveyances seized for violation of the Indian liquor laws.
3671. Vessels carrying explosives and steerage passengers.
3672. Duties of Director of Administrative Office of the United States Courts.
3673. Definitions for sentencing provisions.

[1] Another chapter 232 (§§ 3671 and 3672), which is currently effective, is set out post.

Effective Date of Chapter

Section 235(a)(1) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, provided that the renumbering of sections 3577 to 3580, 3611, 3612, 3615, 3617 to 3620, and 3656 as sections 3661 to 3672, respectively, their designation within a new chapter 232, and the addition of section 3673 shall be effective Nov. 1, 1986.

§ 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

(June 25, 1948, c. 645, § 1, 62 Stat. 683, § 3577 as added Pub.L. 91–452, Title X, § 1001(a), Oct. 15, 1970, 84 Stat. 951, § 3577, and renumbered Pub.L. 98–473, Title II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987.)

Effective Date

Section, formerly section 3577, renumbered 3661, effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3662. Conviction records

(a) The Attorney General of the United States is authorized to establish in the Department of Justice a repository for records of convictions and determinations of the validity of such convictions.

(b) Upon the conviction thereafter of a defendant in a court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court shall cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe.

(c) Records maintained in the repository shall not be public records. Certified copies thereof—

(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession on the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency, or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe; and

(3) shall be prima facie evidence in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof, that the convictions occurred and whether they have been judicially determined to be invalid on collateral review.

(d) The Attorney General of the United States shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations under this section.

(June 25, 1948, c. 645, § 1, 62 Stat. 683, § 3578 as added Pub.L. 91–452, Title X, § 1001(a), Oct. 15, 1970, 84 Stat. 951, § 3578, and renumbered Pub.L. 98–473, Title II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987.)

Effective Date

Section, formerly section 3578, renumbered 3662, effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3663. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the Court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation, modify the term or conditions of supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States in the manner provided in sections 3812 and 3813 or in the same manner as a judgment in a civil action, and by the victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

(June 25, 1948, c. 645, § 1, 62 Stat. 683, § 3579 as added Pub.L. 97–291, § 5(a), Oct. 12, 1982, 96 Stat. 1253, and renumbered and amended Pub.L. 98–473, Title II, § 212(a)(1), (3), Oct. 12, 1984, 98 Stat. 1987, 2010.

Effective Date

Section, formerly section 3579, renumbered 3663, and amended effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

Offenses after January 1, 1983. Section effective with respect to offenses occurring after Jan. 1, 1983, pursuant to section 9(b)(2) of Pub.L. 97–291.

Profit by a Criminal from Sale of His Story. Section 7 of Pub.L. 97–291 provided that: "Within one year after the date of enactment of this Act [Oct. 12, 1982], the Attorney General shall report to Congress regarding any laws that are necessary to ensure that no Federal felon derives any profit from the sale of the recollections, thoughts, and feelings of such felon with regards to the offense committed by the felon until any victim of the offense receives restitution."

§ 3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(June 25, 1948, c. 645, § 1, 62 Stat. 683, § 3580, as added Pub.L. 97–291, § 5(a), Oct. 12, 1982, 96 Stat. 1255, and renumbered Pub.L. 98–473, Title II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987.)

Effective Date

Section, formerly section 3580, renumbered 3664, effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3665. Firearms possessed by convicted felons

A judgment of conviction for transporting a stolen motor vehicle in interstate or foreign commerce or for committing or attempting to commit a felony in violation of any law of the United States involving the use of threats, force, or violence or perpetrated in whole or in part by the use of firearms, may, in addition to the penalty provided by law for such offense, order the confiscation and disposal of firearms and ammunition found in the possession or under the immediate control of the defendant at the time of his arrest.

The court may direct the delivery of such firearms or ammunition to the law-enforcement agency which apprehended such person, for its use or for any other disposition in its discretion.

(June 25, 1948, c. 645, § 1, 62 Stat. 839, § 3611, renumbered Oct. 12, 1984, Pub.L. 98–473, Title II, § 212(a)(1), 98 Stat. 1987.)

Effective Date

Section, formerly section 3665, renumbered 3611, effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3666. Bribe moneys

Moneys received or tendered in evidence in any United States Court, or before any officer thereof, which have been paid to or received by any official as a bribe, shall, after the final disposition of the case, proceeding or investigation, be deposited in the registry of the court to be disposed of in accordance with the order of the court, to be subject, however, to the provisions of section 2042 of Title 28.

(June 25, 1948, c. 645, 62 Stat. 840, § 3612; May 24, 1949, c. 139, § 55, 63 Stat. 96; renumbered Oct. 12, 1984, Pub.L. 98–473, Title II, § 212(a)(1), 98 Stat. 1987.)

Effective Date

Section, formerly section 3612, renumbered 3666, effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3667. Liquors and related property; definitions

All liquor involved in any violation of sections 1261–1265 of this title, the containers of such liquor, and every vehicle or vessel used in the transportation thereof, shall be seized and forfeited and such property or its proceeds disposed of in accordance with the laws relating to seizures, forfeitures, and dispositions of property or proceeds, for violation of the internal-revenue laws.

As used in this section, "vessel" includes every description of watercraft used, or capable of being used, as a means of transportation in water or in water and air; "vehicle" includes animals and ev-

ery description of carriage or other contrivance used, or capable of being used, as a means of transportation on land or through the air.

(June 25, 1948, c. 645, 62 Stat. 840, § 3615; renumbered Oct. 12, 1984, Pub.L. 98–473, Title II, § 212(a)(1), 98 Stat. 1987.)

Effective Date

Section, formerly section 3615, renumbered 3667, effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3668. Remission or mitigation of forfeitures under liquor laws; possession pending trial

(a) Jurisdiction of court

Whenever, in any proceeding in court for the forfeiture, under the internal-revenue laws, of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquors, such forfeiture is decreed, the court shall have exclusive jurisdiction to remit or mitigate the forfeiture.

(b) Conditions precedent to remission or mitigation

In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft, as owner or otherwise, which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or of any State relating to liquor, and (3) if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.

(c) Claimants first entitled to delivery

Upon the request of any claimant whose claim for remission or mitigation is allowed and whose interest is first in the order of priority among such claims allowed in such proceeding and is of an amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to him; and, upon the joint request of any two or more claimants whose claims are allowed and whose interests are not subject to any prior or intervening interests claimed and allowed in such proceedings, and are of a total amount in excess of, or equal to, the appraised value of such vehicle or aircraft, the court shall order its return to such of the joint requesting claimants as is designated in such request. Such return shall be made only upon payment of all expenses incident to the seizure and forfeiture incurred by the United States. In all other cases the court shall order disposition of such vehicle or aircraft as provided in sections 304f–304m of Title 40, and if such disposition be by public sale, payment from the proceeds thereof, after satisfaction of all such expenses, of any such claim in its order of priority among the claims allowed in such proceedings.

(d) Delivery on bond pending trial

In any proceeding in court for the forfeiture under the internal-revenue laws of any vehicle or aircraft seized for a violation of the internal-revenue laws relating to liquor, the court shall order delivery thereof to any claimant who shall establish his right to the immediate possession thereof, and shall execute, with one or more sureties approved by the court, and deliver to the court, a bond to the United States for the payment of a sum equal to the appraised value of such vehicle or aircraft. Such bond shall be conditioned to return such vehicle or aircraft at the time of the trial and to pay the difference between the appraised value of such vehicle or aircraft as of the time it shall have been so released on bond and the appraised value thereof as of the time of trial; and conditioned further that, if the vehicle or aircraft be not returned at the time of trial, the bond shall stand in lieu of, and be forfeited in the same manner as, such vehicle or aircraft. Notwithstanding this subsection or any other provisions of law relating to the delivery of possession on bond of vehicles or aircraft sought to be forfeited under the internal-revenue laws, the court may, in its discretion and upon good cause shown by the United States, refuse to order such delivery of possession.

(June 25, 1948, c. 645, 62 Stat. 840, § 3617; renumbered Oct. 12, 1984, Pub.L. 98–473, Title II, § 212(a)(1), 98 Stat. 1987.)

Effective Date

Section, formerly section 3617, renumbered 3668, effective Nov. 1, 1986, pursuant to Pub.L. 98-473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3669. Conveyances carrying liquor

Any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel, and forfeiture.

(June 25, 1948, c. 645, 62 Stat. 841, § 3618; renumbered Oct. 12, 1984, Pub.L. 98-473, Title II, § 212(a)(1), 98 Stat. 1987.)

Effective Date

Section, formerly section 3618, renumbered 3669, effective Nov. 1, 1986, pursuant to Pub.L. 98-473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3670. Disposition of conveyances seized for violation of the Indian liquor laws

The provisions of section 3668 of this title shall apply to any conveyances seized, proceeded against by libel, or forfeited under the provisions of section 3113 or 3669 of this title for having been used in introducing or attempting to introduce intoxicants into the Indian country or into other places where such introduction is prohibited by treaty or enactment of Congress.

(June 25, 1948, c. 645, § 1, 62 Stat. 683, § 3619, as added Oct. 24, 1951, c. 546, § 2, 65 Stat. 609, § 3619, and renumbered and amended Oct. 12, 1984, Pub.L. 98-473, Title II, §§ 212(a)(1), 223(k), 98 Stat. 1987, 2029.)

Effective Date

Section, formerly section 3619, renumbered 3670, and amended effective Nov. 1, 1986, pursuant to Pub.L. 98-473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3671.[1] Vessels carrying explosives and steerage passengers

The amount of any fine imposed upon the master of a steamship or other vessel under the provisions of section 2278 of this title shall be a lien upon such vessel, and such vessel may be libeled therefor in the district court of the United States for any district in which such vessel shall arrive or from which it shall depart.

(June 25, 1948, c. 645, § 1, 62 Stat. 683, § 3620, as added Sept. 3, 1954, c. 1263, § 36, 68 Stat. 1239, and renumbered Oct. 12, 1984, Pub.L. 98-473, Title II, § 212(a)(1), 98 Stat. 1987.)

[1] Another section 3671 is set out in another chapter 232 post.

Effective Date

Section, formerly section 3620, renumbered 3671, effective Nov. 1, 1986, pursuant to Pub.L. 98-473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3672.[1] Duties of Director of Administrative Office of the United States Courts

The Director of the Administrative Office of the United States Courts, or his authorized agent, shall investigate the work of the probation officers and make recommendations concerning the same to the respective judges and shall have access to the records of all probation officers.

He shall collect for publication statistical and other information concerning the work of the probation officers.

He shall prescribe record forms and statistics to be kept by the probation officers and shall formulate general rules for the proper conduct of the probation work.

He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts.

He shall, under the supervision and direction of the Judicial Conference of the United States, fix the salaries of probation officers and shall provide for their necessary expenses including clerical service and travel expenses.

He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts.

(June 25, 1948, c. 645, 62 Stat. 843, § 3656; May 24, 1949, c. 139, § 57, 63 Stat. 97; renumbered Oct. 12, 1984, Pub.L. 98-473, Title II, § 212(a)(1), 98 Stat. 1987.)

[1] Another section 3672 is set out in another chapter 232 post.

Effective Date

Section, formerly section 3656, renumbered 3672, effective Nov. 1, 1986, pursuant to Pub.L. 98-473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

§ 3673. Definitions for sentencing provisions

As used in chapters 227 and 229—

(a) "found guilty" includes acceptance by a court of a plea of guilty or nolo contendere;

(b) "commission of an offense" includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense; and

(c) "law enforcement officer" means a public servant authorized by law or by a government agency to engage in or supervise the prevention,

detection, investigation, or prosecution of an offense.

(Added Pub.L. 98–473, Title II, § 212(a)(4), Oct. 12, 1984, 98 Stat. 2010.)

Effective Date

Section effective Nov. 1, 1986, pursuant to Pub.L. 98–473, Title II, c. II, § 235, Oct. 12, 1984, 98 Stat. 2031.

CHAPTER 232 [1]—SPECIAL FORFEITURE OF COLLATERAL PROFITS OF CRIME

Sec.

3671. Order of special forfeiture.
3672. Notice to victims of order of special forfeiture.

[1] Another chapter 232 (§§ 3661 to 3673), effective Nov. 1, 1986, is set out ante.

§ 3671.[1] Order of special forfeiture

(a) Upon the motion of the United States attorney made at any time after conviction of a defendant for an offense against the United States resulting in physical harm to an individual, and after notice to any interested party, the court shall, if the court determines that the interest of justice or an order of restitution under chapter 227 or 231 of this title so requires, order such defendant to forfeit all or any part of proceeds received or to be received by that defendant, or a transferee of that defendant, from a contract relating to a depiction of such crime in a movie, book, newspaper, magazine, radio or television production, or live entertainment of any kind, or an expression of that defendant's thoughts, opinions, or emotions regarding such crime.

(b) An order issued under subsection (a) of this section shall require that the person with whom the defendant contracts pay to the Attorney General any proceeds due the defendant under such contract.

(c)(1) Proceeds paid to the Attorney General under this section shall be retained in escrow in the Crime Victims Fund in the Treasury by the Attorney General for five years after the date of an order under this section, but during that five year period may—

(A) be levied upon to satisfy—

(i) a money judgment rendered by a United States district court in favor of a victim of an offense for which such defendant has been convicted, or a legal representative of such victim; and

(ii) a fine imposed by a court of the United States; and

(B) if ordered by the court in the interest of justice, be used to—

(i) satisfy a money judgment rendered in any court in favor of a victim of any offense for which such defendant has been convicted, or a legal representative of such victim; and

(ii) pay for legal representation of the defendant in matters arising from the offense for which such defendant has been convicted, but no more than 20 percent of the total proceeds may be so used.

(2) The court shall direct the disposition of all such proceeds in the possession of the Attorney General at the end of such five years and may require that all or any part of such proceeds be released from escrow and paid into the Crime Victims Fund in the Treasury.

(d) As used in this section, the term "interested party" includes the defendant and any transferee of proceeds due the defendant under the contract, the person with whom the defendant has contracted, and any person physically harmed as a result of the offense for which the defendant has been convicted.

(Added Pub.L. 98–473, Title II, § 1406(a), Oct. 12, 1984, 98 Stat. 2175.)

[1] Another section 3671 is set out in another chapter 232 ante.

Effective Date. Section effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98–473.

§ 3672.[1] Notice to victims of order of special forfeiture

The United States attorney shall, within thirty days after the imposition of an order under this chapter and at such other times as the Attorney General may require, publish in a newspaper of general circulation in the district in which the offense for which a defendant was convicted occurred, a notice that states—

(1) the name of, and other identifying information about, the defendant;

(2) the offense for which the defendant was convicted; and

(3) that the court has ordered a special forfeiture of certain proceeds that may be used to satisfy a judgment obtained against the defendant by a victim of an offense for which the defendant has been convicted.

(Added Pub.L. 98–473, Title II, § 1406(a), Oct. 12, 1984, 98 Stat. 2176.)

[1] Another section 3672 is set out in another chapter 232 ante. A section 3673 is set out in chapter 232 ante.

Effective Date. Section effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98–473.

CHAPTER 233—CONTEMPTS

Sec.
3691. Jury trial of criminal contempts.
3692. Jury trial for contempt in labor dispute cases.
3693. Summary disposition or jury trial; notice—Rule.

§ 3691. Jury trial of criminal contempts

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

HISTORICAL AND REVISION NOTES

Based on sections 386, 389 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary (Oct. 15, 1914, c. 323, §§ 21, 24, 38 Stat. 738, 739).

The first paragraph of this section is completely rewritten from section 386 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, omitting everything covered and superseded by rules 23 and 42 of the Federal Rules of Criminal Procedure.

The second paragraph of this section is derived from section 389 of title 28, U.S.C., 1940 ed., Judicial Code and Judiciary, omitting directions as to the trial of other contempts which are now covered by rule 42 of the Federal Rules of Criminal Procedure.

Minor changes were made in phraseology.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3692. Jury trial for contempt in labor dispute cases

In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court.

HISTORICAL AND REVISION NOTES

Based on section 111 of Title 29, U.S.C., 1940 ed., Labor (Mar. 23, 1932, ch. 90, § 11, 47 Stat. 72).

The phrase "or the District of Columbia arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute" was inserted and the reference to specific sections of the Norris-LaGuardia Act (sections 101–115 of Title 29, U.S.C., 1940 ed.) were eliminated.

§ 3693. Summary disposition or jury trial; notice—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Summary punishment; certificate of judge; order; notice; jury trial; bail; disqualification of judge, Rule 42.

CHAPTER 235—APPEAL

Sec.
3731. Appeal by United States.
3732. Taking of appeal; notice; time—Rule.
3733. Assignment of errors—Rule.
3734. Bill of exceptions abolished—Rule.
3735. Bail on appeal or certiorari—Rule.
3736. Certiorari—Rule.
3737. Record—Rule.
3738. Docketing appeal and record—Rule.
3739. Supervision—Rule.
3740. Argument—Rule.
3741. Harmless error and plain error—Rule.

Amendment of Analysis

Pub.L. 98–473, Title II, c. II, §§ 213(b), 235, Oct. 12, 1984, 98 Stat. 2013, 2031, provided that effective Nov. 1, 1986, the section analysis of chapter 235 be amended by adding, after the item relating to section 3741, the following new item: "3742. Review of a sentence."

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the

double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

(As amended May 24, 1949, c. 139, § 58, 63 Stat. 97; June 19, 1968, Pub.L. 90-351, Title VIII, § 1301, 82 Stat. 237; Jan. 2, 1971, Pub.L. 91-644, Title III, § 14(a), 84 Stat. 1890; Oct. 12, 1984, Pub.L. 98-473, Title II, §§ 205, 1206, 98 Stat. 1986, 2153.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C. 1940 ed., § 682 (Mar. 2, 1907, ch. 2564, 34 Stat. 1246; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 9, 1942, ch. 295, § 1, 56 Stat. 271).

The word "dismissing" was substituted for "sustaining a motion to dismiss" in two places for conciseness and clarity, there being no difference in effect of a decision of dismissal whether made on motion or by the court sua sponte.

Minor changes were made to conform to Rule 12 of the Federal Rules of Criminal Procedure. The final sentence authorizing promulgation of rules is omitted as redundant.

1949 ACT

This section [section 58] corrects a typographical error in the second paragraph of section 3731 of title 18, U.S.C., and conforms the language of the fifth, tenth, and eleventh paragraphs of such section 3731 with the changed nomenclature of title 28, U.S.C., Judiciary and Judicial Procedure. See sections 41, 43, and 451 of the latter title.

§ 3732. Taking of appeal; notice; time—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Taking appeal; notice, contents, signing; time, Rule 37(a).

References in Text. Rule 37(a), referred to in text, was abrogated and is now covered by Rule 3, Federal Rules of Appellate Procedure, this pamphlet.

§ 3733. Assignment of errors—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Assignments of error on appeal abolished, Rule 37(a)(1).

Necessity of specific objection in order to assign error in instructions, Rule 30.

References in Text. Rule 37(a)(1), referred to in text, was abrogated and is now covered by Rule 3, Federal Rules of Appellate Procedure, this pamphlet.

§ 3734. Bill of exceptions abolished—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Exceptions abolished, Rule 51.

Bill of exceptions not required, Rule 37(a)(1).

References in Text. Rule 37(a)(1), referred to in text, was abrogated and is now covered by Rule 3, Federal Rules of Appellate Procedure, this pamphlet.

§ 3735. Bail on appeal or certiorari—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Bail on appeal or certiorari; application, Rules 38(c) and 46(a)(2).

References in Text. Rule 38(c), referred to in text, was abrogated and is now covered by Rule 9, Federal Rules of Appellate Procedure, this pamphlet.

Rule 46, referred to in text, has been amended and some provisions originally contained therein are now covered by this chapter.

§ 3736. Certiorari—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Petition to Supreme Court, time, Rule 37(b).

References in Text. Rule 37(b), referred to in text, was abrogated. See now Rule 19 et seq. of the Rules of the United States Supreme Court, set out in Title 28, Appendix, U.S.C.A., Judiciary and Judicial Procedure.

§ 3737. Record—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Preparation, form; typewritten record, Rule 39(b).

Exceptions abolished, Rule 51.

Bill of exceptions unnecessary, Rule 37(a)(1).

References in Text. Rules 37(a)(1) and 39(b), referred to in text, were abrogated and are now covered by Rule 10, Federal Rules of Appellate Procedure, this pamphlet.

§ 3738. Docketing appeal and record—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Filing record on appeal and docketing proceeding; time, Rule 39(c).

References in Text. Rule 39(c), referred to in text, was abrogated and is now covered by Rules 10 to 12, Federal Rules of Appellate Procedure, this pamphlet.

§ 3739. Supervision—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Control and supervision in appellate court, Rule 39(a).

References in Text. Rule 39(a), referred to in text, was abrogated and is now covered by Rule 27, Federal Rules of Appellate Procedure, this pamphlet.

§ 3740. Argument—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Setting appeal for argument; preference to criminal appeals, Rule 39(d).

References in Text. Rule 39(d), referred to in text, was abrogated and is now covered by Rule 34, Federal Rules of Appellate Procedure, this pamphlet.

§ 3741. Harmless error and plain error—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Error or defect as affecting substantial rights, Rule 52.

Defects in indictment, Rule 7.

Waiver of error, Rules 12(b)(2) and 30.

§ 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is greater than—

(A) the sentence specified in the applicable guideline to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline; and

(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is greater than the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is less than—

(A) the sentence specified in the applicable guideline to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline; and

(B) the sentence specified in a plea agreement, if any, under Rule 11(e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is less than the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure;

and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

(c) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(d) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

(e) Decision and disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, it shall—

(A) remand the case for further sentencing proceedings; or

(B) correct the sentence;

(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and—

(i) remand the case for imposition of a lesser sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a lesser sentence;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and—

(i) remand the case for imposition of a greater sentence;

(ii) remand the case for further sentencing proceedings; or

(iii) impose a greater sentence; or

(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.

(Added Pub.L. 98–473, Title II, § 213(a), Oct. 12, 1984, 98 Stat. 2011.)

Effective Date

Section effective Nov. 1, 1986 pursuant to section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031.

CHAPTER 237—RULES OF CRIMINAL PROCEDURE

Sec.
3771. Procedure to and including verdict.
3772. Procedure after verdict.

§ 3771. Procedure to and including verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(As amended May 24, 1949, c. 139, § 59, 63 Stat. 98; May 10, 1950, c. 174, § 1, 64 Stat. 158; July 7, 1958, Pub.L. 85–508, § 12(k), 72 Stat. 348; March 18, 1959, Pub.L. 86–3, § 14(g), 73 Stat. 11; Oct. 17, 1968, Pub.L. 90–578, Title III, § 301(a)(2), 82 Stat. 1115.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., §§ 687, 689 (June 29, 1940, ch. 445, 54 Stat. 688; Nov. 21, 1941, ch. 492, 55 Stat. 779).

The words "in the United States Court for China" were omitted inasmuch as that court is no longer functioning. The Secretary of State by an arrangement with China has relinquished the extraterritorial jurisdiction previously exercised by the United States in China. The Legislative and Judicial Appropriation Act of June 28, 1943, made no appropriation for the United States Court for China. Appropriations for other courts were made in title II of chapter 173, 57 Stat. 241. The last appropriation for the United States Court for China was in the act of July 2, 1942, ch. 472, title IV, 56 Stat. 502. The United States Court for China is not mentioned in rule 54(a) of the Federal Rules of Criminal Procedure in which the courts to which the rules apply are listed.

The only other changes were phraseological and the consolidation of the provision for criminal contempt of section 689 of title 18, U.S.C., 1940 ed., in this section.

1949 Act

This section [section 59] amends section 3771 of title 18, U.S.C., to permit amended procedural rules to be reported to Congress by the Chief Justice, instead of being channeled through the Attorney General as at present. The present provision that the Attorney General should act as a transmitting agent between the Supreme Court and the Congress is inconsistent with the plan of title 28, U.S.C., under which the Attorney General no longer acts as the administrative officer of the Federal courts. The provision was continued in section 3771 of title 18 inadvertently. Similar amendments are proposed for sections 2072 and 2073 of title 28 by other sections of this bill.

The other amendments by this section conform section 3771 with the changed nomenclature of title 28, U.S.C., Judiciary and Judicial Procedure. (See secs. 41, 43 and 451 of the latter title.)

§ 3772. Procedure after verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or release pending appeal may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(As amended May 24, 1949, c. 139, § 60, 63 Stat. 98; July 7, 1958, Pub.L. 85–508, § 12(*l*), 72 Stat. 348; March 18, 1959, Pub.L. 86–3, § 14(h), 73 Stat. 11; Oct. 12, 1984, Pub.L. 98–473, Title II, § 206, 98 Stat. 1986.)

Historical and Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., §§ 688, 689 (Feb. 24, 1933, ch. 119, §§ 1–3, 47 Stat. 904; Mar. 8, 1934, ch. 49, 48 Stat. 399; June 7, 1934, ch. 426, 48 Stat. 926; June 25, 1936, ch. 804, 49 Stat. 1921; Nov. 21, 1941, ch. 492, 55 Stat. 779.)

The words "in the United States Court for China" were omitted, since that court no longer functions. (See reviser's note under section 3771 of this title.) The Supreme Court in promulgating rules under this section did not include the United States Court for China among the courts to which the rules were applicable.

The courts of appeals of the several judicial circuits are given jurisdiction of appeals from "all final decisions of the district courts" except where a direct review may be had in the Supreme Court of the United States by section 1291 of the proposed revision of title 28. See, also, section 1295 of that revision as to circuits in which decisions are reviewable. This is the statutory basis upon which rests the defendant's right of appeal in criminal cases.

Minor changes were made in phraseology.

1949 Act

This section [section 60] conforms the first paragraph of section 3772 of title 18, U.S.C., with the changed nomenclature of title 28, U.S.C., Judiciary and Judicial Procedure. (See secs. 41, 43, and 451 of the latter title.) A typographical error is also corrected.

PART III—PRISONS AND PRISONERS

Chapter		Sec.
301.	General provisions	4001
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306.[1]	Transfer to or from foreign countries	4100
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[1] Heading for chapter editorially supplied.

Amendment of Analysis

Pub.L. 98–473, Title II, §§ 218(d), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that, effective Nov. 1, 1986, the chapter analysis of this part is amended by amending the items relating to chapters 309, 311, and 314 to read as follows;

"309. Repealed .....
"311. Repealed .....
"314. Repealed ..... ".

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

CHAPTER 301—GENERAL PROVISIONS

Sec.
4001. Limitation on detention; control of prisons.
4002. Federal prisoners in State institutions; employment.
4003. Federal institutions in States without appropriate facilities.
4004. Oaths and acknowledgments.
4005. Medical relief; expenses.
4006. Subsistence for prisoners.
4007. Expenses of prisoners.
4008. Transportation expenses.
4009. Appropriations for sites and buildings.
4010. Acquisition of additional land.
4011. Disposition of cash collections for meals, laundry, etc.
4012. Summary seizure and forfeiture of prison contraband.

§ 4001. Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b) (1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

(As amended Sept. 25, 1971, Pub.L. 92–128, § 1(a), (b), 85 Stat. 347.)

Historical and Revision Notes

Based on title 18, U.S.C., 1934 ed., §§ 741 and 753e (Mar. 3, 1891, ch. 529, §§ 1, 4, 26 Stat. 839; May 14, 1930, ch. 274, § 6, 46 Stat. 326).

This section consolidates said sections 741 and 753e with such changes of language as were necessary to effect consolidation.

"The Classification Act, as amended," was inserted more clearly to express the existing procedure for appointment of officers and employees as noted in letter of the Director of Bureau of Prisons, June 19, 1944.

References in Text. The Classification Act, as amended, referred to in subsec. (b)(1), was repealed. See now section 5101 et seq. and section 5331 et seq. of Title 5, U.S.C.A., Government Organization and Employees.

§ 4002. Federal prisoners in State institutions; employment

For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.

The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities

to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

(As amended Nov. 9, 1978, Pub.L. 95-624, § 8, 92 Stat. 3463.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 753b (May 14, 1930, ch. 274, § 3, 46 Stat. 325).

Changes were made in phraseology. The first sentence was incorporated in section 4042 of this title.

§ 4003. Federal institutions in States without appropriate facilities

If by reason of the refusal or inability of the authorities having control of any jail, workhouse, penal, correctional, or other suitable institution of any State or Territory, or political subdivision thereof, to enter into a contract for the imprisonment, subsistence, care, or proper employment of United States prisoners, or if there are no suitable or sufficient facilities available at reasonable cost, the Attorney General may select a site either within or convenient to the State, Territory, or judicial district concerned and cause to be erected thereon a house of detention, workhouse, jail, prison-industries project, or camp, or other place of confinement, which shall be used for the detention of persons held under authority of any Act of Congress, and of such other persons as in the opinion of the Attorney General are proper subjects for confinement in such institutions.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 753c (May 14, 1930, ch. 274, § 4, 46 Stat. 326).

Words "with or without hard labor" were omitted as unnecessary in view of omission of "hard labor" as part of the punishment. (See reviser's note under section 1 of this title.)

The phrase "held under authority of any Act of Congress," was substituted for the following "held as material witnesses, persons awaiting trial, persons sentenced to imprisonment and awaiting transfer to other institutions, persons held for violation of the immigration laws or awaiting deportation, and for the confinement of persons convicted of offenses against the United States and sentenced to imprisonment".

Minor changes in arrangement and phraseology were made.

§ 4004. Oaths and acknowledgments

The wardens and superintendents, associate wardens and superintendents, chief clerks, record clerks, and parole officers, of Federal penal or correctional institutions, may administer oaths to and take acknowledgments of officers, employees, and inmates of such institutions, but shall not demand or accept any fee or compensation therefor.

(As amended July 7, 1955, c. 282, 69 Stat. 282.)

Amendment of Section

Pub.L. 98-473, Title II, §§ 223(l), 235, Oct. 12, 1984, 98 Stat. 2029, 2031, provided that, effective Nov. 1, 1986, this section is amended by deleting "record clerks, and parole officers" and substituting "and record clerks".

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 754 (Feb. 11, 1938, ch. 24, §§ 1, 2, 52 Stat. 28).

Section was extended to include superintendents and associate superintendents.

Minor changes were made in phraseology. Words "the authority conferred by" were omitted as surplusage.

§ 4005. Medical relief; expenses

(a) Upon request of the Attorney General, the Federal Security Administrator shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons, and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions.

(b) The compensation, allowances, and expenses of the personnel detailed under this section may be paid from applicable appropriations of the Public Health Service in accordance with the law and regulations governing the personnel of the Public Health Service, such appropriations to be reimbursed from applicable appropriations of the Department of Justice; or the Attorney General may make allotments of funds and transfer of credit to the Public Health Service in such amounts as are available and necessary, for payment of compensation, allowances, and expenses of personnel so detailed, in accordance with the law and regulations governing the personnel of the Public Health Service.

Transfer of Functions. All functions of the Federal Security Administrator were transferred to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services, and the office of Federal Security Administrator was abolished.

All functions of the Public Health Service, of the Surgeon General of the Public Health Service, and of all other officers and employees of the Public Health Service, and all functions of all agencies of or in the Public Health Service were transferred to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 751, 752 (May 13, 1930, ch. 256, §§ 1, 2, 46 Stat. 273; Reorg. Plan No. I, §§ 201, 205, 4 F.R. 2728, 2729, 53 Stat. 1424, 1425).

Section consolidates sections 751 and 752 of title 18, U.S.C., 1940 ed., as subsections (a) and (b), respectively.

"Federal Security Administrator" was substituted for "Federal Security Agency."

Functions of the Secretary of the Treasury were transferred to the Federal Security Administrator by Reorg. Plan No. I, § 205, 4 F.R. 2729, 53 Stat. 1425. (See note under section 133t of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.)

The first part of said section 751, which read "Authorized medical relief under the Department of Justice in Federal penal and correctional institutions shall be supervised and furnished by personnel of the Public Health Service, and" was omitted as surplusage, considering the remainder of the text.

Minor changes of phraseology were made.

§ 4006. Subsistence for prisoners

The Attorney General shall allow and pay only the reasonable and actual cost of the subsistence of prisoners in the custody of any marshal of the United States, and shall prescribe such regulations for the government of the marshals as will enable him to determine the actual and reasonable expenses incurred.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 703 (R.S. § 5545; Mar. 2, 1911, ch. 192, 36 Stat. 1003).

The provisions relating to the Washington Asylum and Jail are now included in the District of Columbia Code. (See D.C. Code, 1940 ed., § 24–421.)

Changes of phraseology were made.

§ 4007. Expenses of prisoners

The expenses attendant upon the confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the Treasury of the United States in the manner provided by law.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 701 (R.S. § 5536).

Provision authorizing expenses for transportation was omitted as covered by similar provision in section 4008 of this title.

Minor changes of phraseology were made.

§ 4008. Transportation expenses

Prisoners shall be transported by agents designated by the Attorney General or his authorized representative.

The reasonable expense of transportation, necessary subsistence, and hire and transportation of guards and agents shall be paid by the Attorney General from such appropriation for the Department of Justice as he shall direct.

Upon conviction by a consular court or court martial the prisoner shall be transported from the court to the place of confinement by agents of the Department of State, the Army, Navy, or Air Force, as the case may be, the expense to be paid out of the Treasury of the United States in the manner provided by law.

(As amended May 24, 1949, c. 139, § 61, 63 Stat. 98.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., § 753g (May 14, 1930, ch. 274, § 8, 46 Stat. 327).

The second paragraph was originally a proviso.

Minor changes of phraseology were made.

1949 ACT

This section [section 61] corrects the third paragraph of section 4008 of title 18, U.S.C., by redesignating the "War Department" as the "Department of the Army", to conform to such redesignation by act of July 26, 1947 (ch. 343, title II, § 205(a), 61 Stat. 501), and by inserting a reference to the Department of the Air Force, in view of the creation of such Department by the same act.

§ 4009. Appropriations for sites and buildings

The Attorney General may authorize the use of a sum not to exceed $100,000 in each instance, payable from any unexpended balance of the appropriation "Support of United States prisoners" for the purpose of leasing or acquiring a site, preparation of plans, and erection of necessary buildings under section 4003 of this title.

If in any instance it shall be impossible or impracticable to secure a proper site and erect the necessary buildings within the above limitation the Attorney General may authorize the use of a sum not to exceed $10,000 in each instance, payable from any unexpended balance of the appropriation "Support of United States prisoners" for the purpose of securing options and making preliminary surveys or sketches.

Upon selection of an appropriate site the Attorney General shall submit to Congress an estimate of the cost of purchasing same and of remodeling, constructing, and equipping the necessary buildings thereon.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 753d (May 14, 1930, ch. 274, § 5, 46 Stat. 326).

Minor changes of phraseology were made.

§ 4010. Acquisition of additional land

The Attorney General may, when authorized by law, acquire land adjacent to or in the vicinity of a Federal penal or correctional institution if he considers the additional land essential to the protection of the health or safety of the inmates of the institution.

(Added Pub.L. 89–554, § 3(f), Sept. 6, 1966, 80 Stat. 610.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 341f.	July 28, 1950, ch. 503, § 7, 64 Stat. 381. Sept. 16, 1959, Pub.L. 86–286, 73 Stat. 567.

The reference to an appropriation law is omitted as covered by the words "when authorized by law".

§ 4011. Disposition of cash collections for meals, laundry, etc.

Collections in cash for meals, laundry, barber service, uniform equipment, and other items for which payment is made originally from appropriations for the maintenance and operation of Federal penal and correctional institutions, may be deposited in the Treasury to the credit of the appropriation currently available for those items when the collection is made.

(Added Pub.L. 89–554, § 3(f), Sept. 6, 1966, 80 Stat. 610.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 341g.	July 28, 1950, ch. 503, § 8, 64 Stat. 381.

§ 4012. Summary seizure and forfeiture of prison contraband

An officer or employee of the Bureau of Prisons may, pursuant to rules and regulations of the Director of the Bureau of Prisons, summarily seize any object introduced into a Federal penal or correctional facility or possessed by an inmate of such a facility in violation of a rule, regulation or order promulgated by the Director, and such object shall be forfeited to the United States.

(Added Pub.L. 98–473, Title II, § 1109(d), Oct. 12, 1984, 98 Stat. 2148.)

CHAPTER 303—BUREAU OF PRISONS

Sec.
4041. Bureau of Prisons; director and employees.
4042. Duties of Bureau of Prisons.
4043. Acceptance of gifts and bequests to the Commissary Funds, Federal Prisons.

§ 4041. Bureau of Prisons; director and employees

The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General at a salary of $10,000 a year. The Attorney General may appoint such additional officers and employees as he deems necessary.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 753 (May 14, 1930, ch. 274, § 1, 46 Stat. 325).

The entire second sentence was omitted as executed. All powers and authority originally vested in the former Superintendent of Prisons are now possessed by the Bureau of Prisons.

Minor changes of phraseology were made.

Compensation of Director. Annual rate of basic pay of Director, see section 5315 of Title 5, U.S.C.A., Government Organization and Employees.

§ 4042. Duties of Bureau of Prisons

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;

(4) Provide technical assistance to State and local governments in the improvement of their correctional systems.

This section shall not apply to military or naval penal or correctional institutions or the persons confined therein.

(As amended July 1, 1968, Pub.L. 90–371, 82 Stat. 280.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 753a, 753b, (May 14, 1930, ch. 274, §§ 2, 3, 46 Stat. 325).

Because of similarity in the provisions, the first sentence of section 753b of title 18, U.S.C., 1940 ed., was consolidated with section 753a of title 18, U.S.C., 1940 ed., to form this section.

Minor changes were made in phraseology.

The remainder of said section 753b of title 18, U.S.C., 1940 ed., is incorporated in section 4002 of this title.

§ 4043. Acceptance of gifts and bequests to the Commissary Funds, Federal Prisons

The Attorney General may accept gifts or bequests of money for credit to the "Commissary Funds, Federal Prisons". A gift or bequest under this section is a gift or bequest to or for the use of the United States under the Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.).

(Added Pub.L. 97–258, § 2(d)(4)(B), Sept. 13, 1982, 96 Stat. 1059.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
4043	31:725s–4.	May 15, 1952, ch. 289, § 2, 66 Stat. 72; July 9, 1952, ch. 600, 66 Stat. 479.

References in Text. The Internal Revenue Code of 1954, referred to in text, is classified generally to Title 26, U.S.C.A. Internal Revenue Code.

CHAPTER 305—COMMITMENT AND TRANSFER

Sec.

4081. Classification and treatment of prisoners.
4082. Commitment to Attorney General; residential treatment centers, extension of limits of confinement; work furlough.
4083. Penitentiary imprisonment; consent.
4084. Copy of commitment delivered with prisoner.
4085. Transfer for state offense; expense.
4086. Temporary safe-keeping of federal offenders by marshals.

Amendment of Analysis

Pub.L. 98–473, Title II, §§ 218(e), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that, effective Nov. 1, 1986, the items relating to sections 4084 and 4085 in the section analysis of this chapter are amended to read as follows:

"4084. Repealed.

"4085. Repealed.".

§ 4081. Classification and treatment of prisoners

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 907 (May 27, 1930, ch. 339, § 7, 46 Stat. 390).

Language of section is so changed as to make one policy for all institutions, thus clarifying the manifest intent of Congress.

Minor changes were made in phraseology.

§ 4082. Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough

(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

(c) The Attorney General may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to—

(1) visit a specifically designated place or places for a period not to exceed thirty days and return to the same or another institution or facility. An extension of limits may be granted to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services not otherwise available, the contacting of prospective employers, the establishment or reestablishment of family and community ties or for any other significant reason consistent with the public interest; or

(2) work at paid employment or participate in a training program in the community on a volun-

tary basis while continuing as a prisoner of the institution or facility to which he is committed, provided that—

(i) representatives of local union central bodies or similar labor union organizations are consulted;

(ii) such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(iii) the rates of pay and other conditions of employment will not be less than those paid or provided for work of similar nature in the locality in which the work is to be performed.

A prisoner authorized to work at paid employment in the community under this subsection may be required to pay, and the Attorney General is authorized to collect, such costs incident to the prisoner's confinement as the Attorney General deems appropriate and reasonable. Collections shall be deposited in the Treasury of the United States as miscellaneous receipts.

(d) The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General punishable as provided in chapter 35 of this title.

(e) The authority conferred upon the Attorney General by this section shall extend to all persons committed to the National Training School for Boys.

(f) As used in this section—

the term "facility" shall include a residential community treatment center; and

the term "relative" shall mean a spouse, child (including stepchild, adopted child or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person who, though not a natural parent, has acted in the place of a parent), brother, or sister.

(As amended Sept. 10, 1965, Pub.L. 89–176, § 1, 79 Stat. 674; Dec. 28, 1973, Pub.L. 93–209, 87 Stat. 907.)

Repeal of Subsecs. (a) to (c) and (e)

Pub.L. 98–473, Title II, c. II, §§ 218(a)(3), foll. (a)(8), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that subsecs. (a) to (c) and (e) of this section are repealed effective Nov. 1, 1986 and that subsecs. (d) and (f) are thereupon redesignated (a) and (b).

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 753f (May 14, 1930, ch. 274, § 7, 46 Stat. 326; June 14, 1941, ch. 204, 55 Stat. 252; Oct. 21, 1941, ch. 453, 55 Stat. 743).

Words "by the juvenile court of the District of Columbia, as well as to those committed by any court of the United States," at end of section were omitted as unnecessary, and word "all" inserted before "persons", without change of meaning.

Provision against penitentiary imprisonment for a term of 1 year or less without consent of defendant was incorporated in section 4083 of this title.

The phrase "if in his judgment it shall be for the well-being of the prisoner or relieve overcrowded or unhealthful conditions in the institution where such person is confined or for other reasons", was omitted as unnecessary.

Changes were made in phraseology.

This section supersedes section 705 of title 18, U.S.C., 1940 ed., providing for execution of sentences in houses of correction or reformation; and section 748 of title 18, U.S.C., 1940 ed., providing for confinement of prisoners in United States Disciplinary Barracks.

Abolition of National Training School for Boys. The National Training School for Boys was closed May 15, 1968 pursuant to order of the Attorney General.

EXECUTIVE ORDER NO. 11755

Dec. 29, 1973, 39 F.R. 779

PRISON LABOR

The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society. Meaningful employment serves to develop those skills. It is also true, however, that care must be exercised to avoid either the exploitation of convict labor or any unfair competition between convict labor and free labor in the production of goods and services.

Under section 4082 of title 18 of the United States Code [this section], the Attorney General is empowered to authorize Federal prisoners to work at paid employment in the community during their terms of imprisonment under conditions that protect against both the exploitation of convict labor and unfair competition with free labor.

Several states and other jurisdictions have similar laws or regulations under which individuals confined for violations of the laws of those places may be authorized to work at paid employment in the community.

Executive Order No. 325A, which was originally issued by President Theodore Roosevelt in 1905, prohibits the employment, in the performance of Federal contracts, of any person who is serving a sentence of imprisonment at hard labor imposed by a court of a State, territory, or municipality.

I have now determined that Executive Order No. 325A should be replaced with a new Executive order which would permit the employment of non-Federal prison inmates in the performance of Federal contracts under terms and conditions that are comparable to those now applicable to inmates of Federal prisons.

Now, THEREFORE, pursuant to the authority vested in me as President of the United States, it is hereby ordered as follows:

Section 1. (a) All contracts involving the use of appropriated funds which shall hereafter be entered into by any department or agency of the executive branch for performance in any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands shall, unless otherwise provided by law, contain a stipulation forbidding in the performance of such contracts, the employment of persons undergoing sentences of imprisonment which have been imposed by any court of a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa or the Trust Territory of the Pacific Islands. This limitation, however, shall not prohibit the employment by a contractor in the performance of such contracts of persons on parole or probation to work at paid employment during the term of their sentence or persons who have been pardoned or who have served their terms. Nor shall it prohibit the employment by a contractor in the performance of such contracts of persons confined for violation of the laws of any of the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands who are authorized to work at paid employment in the community under the laws of such jurisdiction, if

(1)(A) The worker is paid or is in an approved work training program on a voluntary basis;

(B) Representatives of local union central bodies or similar labor union organizations have been consulted;

(C) Such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(D) The rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality in which the work is being performed; and

(2) The Attorney General has certified that the work-release laws or regulations of the jurisdiction involved are in conformity with the requirements of this order.

(b) After notice and opportunity for hearing, the Attorney General shall revoke any such certification under section 1(a)(2) if he finds that the work-release program of the jurisdiction involved is not being conducted in conformity with the requirements of this order or with its intent or purposes.

Sec. 2. The Federal Procurement Regulations, the Armed Services Procurement Regulations, and to the extent necessary, any supplemental or comparable regulations issued by any agency of the executive branch shall be revised to reflect the policy prescribed by this order.

Sec. 3. Executive Order No. 325A is hereby superseded.

Sec. 4. This order shall be effective as of January 1, 1974.

RICHARD NIXON

§ 4083. Penitentiary imprisonment; consent

Persons convicted of offenses against the United States or by courts-martial punishable by imprisonment for more than one year may be confined in any United States penitentiary.

A sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant.

(As amended Sept. 14, 1959, Pub.L. 86–256, 73 Stat. 518.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 753f, 762 (Mar. 2, 1895, ch. 189, § 1, 28 Stat. 957; June 10, 1896, ch. 400, § 1, 29 Stat. 380; May 14, 1930, ch. 274, § 7, 46 Stat. 326; June 14, 1941, ch. 204, 55 Stat. 252; Oct. 21, 1941, ch. 453, 55 Stat. 743).

Said section 762 was condensed and simplified and extended to all penitentiaries instead of to Leavenworth only, since the section is merely declaratory of existing law. (See section 1 of this title classifying offenses and notes thereunder.)

The second paragraph is derived from said section 753f of title 18, U.S.C., 1940 ed.

Minor changes of phraseology were made.

§ 4084. Copy of commitment delivered with prisoner

Whenever a prisoner is committed to a warden, sheriff or jailer by virtue of a writ, or warrant, a copy thereof shall be delivered to such officer as his authority to hold the prisoner, and the original shall be returned to the proper court or officer, with the officer's return endorsed thereon.

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(3), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 603 (R.S. § 1028).

Word "warden," was inserted before "sheriff" to cover all officers receiving prisoners. Other minor changes of phraseology were made.

§ 4085. Transfer for state offense; expense

(a) Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.

If more than one such request is presented in respect to any prisoner, the Attorney General shall determine which request should receive preference.

The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."

(b) This section shall not limit the authority of the Attorney General to transfer prisoners pursuant to other provisions of law.

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(3), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 733, 733a, 733b (Apr. 30, 1940, ch. 176, §§ 1, 2, 3, 54 Stat. 175, 176).

Section consolidates sections 733, 733a, and 733b of title 18, U.S.C., 1940 ed.

Definitions of "indictment," "indicted," and "State" were omitted as unnecessary in view of the inclusion of equivalent terms in the revised text.

Necessary changes were made in translations of text references and in phraseology.

§ 4086. Temporary safe-keeping of federal offenders by marshals

United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 691, 692, (R.S. §§ 5537, 5538).

Said section 691 of title 18, U.S.C., 1940 ed., is superseded by sections 753b and 753c of title 18, U.S.C., 1940 ed., which are incorporated in sections 4002, 4003, and 4042 of this title.

This section is rewritten to retain the intent of section 692 of title 18, U.S.C., 1940 ed., which was to insure a safekeeping of United States prisoners until their commitment or confinement in Federal penal institutions. The language conforms with that of said sections 692 and 753b.

Minor changes were made in phraseology.

CHAPTER 306—TRANSFER TO OR FROM FOREIGN COUNTRIES

Sec.

4100. Scope and limitation of chapter.
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4102. Authority of the Attorney General.
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§ 4100. Scope and limitation of chapter

(a) The provisions of this chapter relating to the transfer of offenders shall be applicable only when a treaty providing for such a transfer is in force, and shall only be applicable to transfers of offenders to and from a foreign country pursuant to such a treaty. A sentence imposed by a foreign country upon an offender who is subsequently transferred to the United States pursuant to a treaty shall be subject to being fully executed in the United States even though the treaty under which the offender was transferred is no longer in force.

(b) An offender may be transferred from the United States pursuant to this chapter only to a country of which the offender is a citizen or national. Only an offender who is a citizen or national of the United States may be transferred to the United States. An offender may be transferred to or from the United States only with the offender's consent, and only if the offense for which the offender was sentenced satisfies the requirement of double criminality as defined in this chapter. Once an offender's consent to transfer has been verified by a verifying officer, that consent shall be irrevocable. If at the time of transfer the offender is under eighteen years of age the transfer shall not be accomplished unless consent to the transfer be given by a parent or guardian or by an appropriate court of the sentencing country.

(c) An offender shall not be transferred to or from the United States if a proceeding by way of appeal or of collateral attack upon the conviction or sentence be pending.

(d) The United States upon receiving notice from the country which imposed the sentence that the offender has been granted a pardon, commutation, or amnesty, or that there has been an ameliorating modification or a revocation of the sentence shall

give the offender the benefit of the action taken by the sentencing country.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1212.)

§ 4101. Definitions

As used in this chapter the term—

(a) "double criminality" means that at the time of transfer of an offender the offense for which he has been sentenced is still an offense in the transferring country and is also an offense in the receiving country. With regard to a country which has a federal form of government, an act shall be deemed to be an offense in that country if it is an offense under the federal laws or the laws of any state or province thereof;

(b) "imprisonment" means a penalty imposed by a court under which the individual is confined to an institution;

(c) "juvenile" means—

(1) a person who is under eighteen years of age; or

(2) for the purpose of proceedings and disposition under chapter 403 of this title because of an act of juvenile delinquency, a person who is under twenty-one years of age;

(d) "juvenile delinquency" means—

(1) a violation of the laws of the United States or a State thereof or of a foreign country committed by a juvenile which would have been a crime if committed by an adult; or

(2) noncriminal acts committed by a juvenile for which supervision or treatment by juvenile authorities of the United States, a State thereof, or of the foreign country concerned is authorized;

(e) "offender" means a person who has been convicted of an offense or who has been adjudged to have committed an act of juvenile delinquency;

(f) "parole" means any form of release of an offender from imprisonment to the community by a releasing authority prior to the expiration of his sentence, subject to conditions imposed by the releasing authority and to its supervision;

(g) "probation" means any form of a sentence to a penalty of imprisonment the execution of which is suspended and the offender is permitted to remain at liberty under supervision and subject to conditions for the breach of which the suspended penalty of imprisonment may be ordered executed;

(h) "sentence" means not only the penalty imposed but also the judgment of conviction in a criminal case or a judgment of acquittal in the same proceeding, or the adjudication of delinquency in a juvenile delinquency proceeding or dismissal of allegations of delinquency in the same proceedings;

(i) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(j) "transfer" means a transfer of an individual for the purpose of the execution in one country of a sentence imposed by the courts of another country; and

(k) "treaty" means a treaty under which an offender sentenced in the courts of one country may be transferred to the country of which he is a citizen or national for the purpose of serving the sentence.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1213.)

Amendment of Section

Pub.L. 98–473, Title II, §§ 223(m)(1), 235, Oct. 12, 1984, 98 Stat. 2029, 2031, provided that, effective Nov. 1, 1986, this section is amended:

(A) in subsection (f), by adding ", including a term of supervised release pursuant to section 3583" after "supervision"; and

(B) in subsection (g), by deleting "to a penalty of imprisonment the execution of which is suspended and" and substituting "under which", and by deleting "the suspended" and substituting "a".

§ 4102. Authority of the Attorney General

The Attorney General is authorized—

(1) to act on behalf of the United States as the authority referred to in a treaty;

(2) to receive custody of offenders under a sentence of imprisonment, on parole, or on probation who are citizens or nationals of the United States transferred from foreign countries and as appropriate confine them in penal or correctional institutions, or assign them to the parole or probation authorities for supervision;

(3) to transfer offenders under a sentence of imprisonment, on parole, or on probation to the foreign countries of which they are citizens or nationals;

(4) to make regulations for the proper implementation of such treaties in accordance with this chapter and to make regulations to implement this chapter;

(5) to render to foreign countries and to receive from them the certifications and reports required to be made under such treaties;

(6) to make arrangements by agreement with the States for the transfer of offenders in their custody who are citizens or nationals of foreign countries to the foreign countries of which they are citizens or nationals and for the confinement, where appropriate, in State institutions of offenders transferred to the United States;

(7) to make agreements and establish regulations for the transportation through the territory of the United States of offenders convicted in a foreign country who are being transported to a third country for the execution of their sentences, the expenses of which shall be paid by the country requesting the transportation;

(8) to make agreements with the appropriate authorities of a foreign country and to issue regulations for the transfer and treatment of juveniles who are transferred pursuant to treaty, the expenses of which shall be paid by the country of which the juvenile is a citizen or national;

(9) in concert with the Secretary of Health, Education, and Welfare, to make arrangements with the appropriate authorities of a foreign country and to issue regulations for the transfer and treatment of individuals who are accused of an offense but who have been determined to be mentally ill; the expenses of which shall be paid by the country of which such person is a citizen or national;

(10) to designate agents to receive, on behalf of the United States, the delivery by a foreign government of any citizen or national of the United States being transferred to the United States for the purpose of serving a sentence imposed by the courts of the foreign country, and to convey him to the place designated by the Attorney General. Such agent shall have all the powers of a marshal of the United States in the several districts through which it may be necessary for him to pass with the offender, so far as such power is requisite for the offender's transfer and safekeeping; within the territory of a foreign country such agent shall have such powers as the authorities of the foreign country may accord him;

(11) to delegate the authority conferred by this chapter to officers of the Department of Justice.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1214.)

Change of Name. The Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services and the Secretary, or any other official, of Health, Education, and Welfare was redesignated the Secretary or official, as appropriate, of Health and Human services by Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, with any reference to the Department, Secretary or other official of Health, Education, and Welfare deemed to refer to the Department, Secretary or other official of Health and and Human Services, except to the extent such reference is to a function or office transferred to the Secretary or Department of Education pursuant to section 301 of Pub.L. 96–88. See sections 3441 and 3508 of Title 20, U.S.C.A., Education.

§ 4103. Applicability of United States laws

All laws of the United States, as appropriate, pertaining to prisoners, probationers, parolees, and juvenile offenders shall be applicable to offenders transferred to the United States, unless a treaty or this chapter provides otherwise.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1215.)

§ 4104. Transfer of offenders on probation

(a) Prior to consenting to the transfer to the United States of an offender who is on probation, the Attorney General shall determine that the appropriate United States district court is willing to undertake the supervision of the offender.

(b) Upon the receipt of an offender on probation from the authorities of a foreign country, the Attorney General shall cause the offender to be brought before the United States district court which is to exercise supervision over the offender.

(c) The court shall place the offender under supervision of the probation officer of the court. The offender shall be supervised by a probation officer, under such conditions as are deemed appropriate by the court as though probation had been imposed by the United States district court.

(d) The probation may be revoked in accordance with section 3653 of this title and rule 32(f) of the Federal Rules of Criminal Procedure. A violation of the conditions of probation shall constitute grounds for revocation. If probation is revoked the suspended sentence imposed by the sentencing court shall be executed.

(e) The provisions of sections 4105 and 4106 of this title shall be applicable following a revocation of probation.

(f) Prior to consenting to the transfer from the United States of an offender who is on probation, the Attorney General shall obtain the assent of the court exercising jurisdiction over the probationer.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1215.)

§ 4105. Transfer of offenders serving sentence of imprisonment

(a) Except as provided elsewhere in this section, an offender serving a sentence of imprisonment in a foreign country transferred to the custody of the Attorney General shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States for the period of time imposed by the sentencing court.

(b) The transferred offender shall be given credit toward service of the sentence for any days, prior to the date of commencement of the sentence, spent in custody in connection with the offense or acts for which the sentence was imposed.

(c)(1) The transferred offender shall be entitled to all credits for good time, for labor, or any other

credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer. Subsequent to the transfer, the offender shall in addition be entitled to credits for good time, computed on the basis of the time remaining to be served at the time of the transfer and at the rate provided in section 4161 of this title for a sentence of the length of the total sentence imposed and certified by the foreign authorities. These credits shall be combined to provide a release date for the offender pursuant to section 4164 of this title.

(2) If the country from which the offender is transferred does not give credit for good time, the basis of computing the deduction from the sentence shall be the sentence imposed by the sentencing court and certified to be served upon transfer, at the rate provided in section 4161 of this title.

(3) A transferred offender may earn extra good time deductions, as authorized in section 4162 of this title, from the time of transfer.

(4) All credits toward service of the sentence, other than the credit for time in custody before sentencing, may be forfeited as provided in section 4165 of this title and may be restored by the Attorney General as provided in section 4166 of this title.

(5) Any sentence for an offense against the United States, imposed while the transferred offender is serving the sentence of imprisonment imposed in a foreign country, shall be aggregated with the foreign sentence, in the same manner as if the foreign sentence was one imposed by a United States district court for an offense against the United States.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1215.)

Amendment of Section

Pub.L. 98–473, Title II, §§ 223(m)(2), 235, Oct. 12, 1984, 98 Stat. 2029, 2031, provided that, effective Nov. 1, 1986, subsec. (c) of this section is amended:

(A) in paragraph (1), by deleting "for good time" the second place it appears and substituting "toward service of sentence for satisfactory behavior";

(B) in paragraphs (1) and (2), by deleting "section 4161" and substituting "section 3624(b)";

(C) in paragraph (1), by deleting "section 4164" and substituting "section 3624(a)";

(D) by repealing paragraph (3);

(E) by amending paragraph (4) to read as follows:

"(3) Credit toward service of sentence may be withheld as provided in section 3624(b) of this title."; and

(F) by redesignating paragraphs accordingly.

§ 4106. Transfer of offenders on parole; parole of offenders transferred

(a) Upon the receipt of an offender who is on parole from the authorities of a foreign country, the Attorney General shall assign the offender to the United States Parole Commission for supervision.

(b) The United States Parole Commission and the Chairman of the Commission shall have the same powers and duties with reference to an offender transferred to the United States to serve a sentence of imprisonment or who at the time of transfer is on parole as they have with reference to an offender convicted in a court of the United States except as otherwise provided in this chapter or in the pertinent treaty. Sections 4201 through 4204; 4205(d), (e), and (h); 4206 through 4216; and 4218 of this title shall be applicable.

(c) An offender transferred to the United States to serve a sentence of imprisonment may be released on parole at such time as the Parole Commission may determine.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1216.)

Amendment of Section

Pub.L. 98–473, Title II, §§ 223(m)(3), 235, Oct. 12, 1984, 98 Stat. 2029, 2031, provided that, effective Nov. 1, 1986, this section is amended:

(A) in subsection (a), by deleting "Parole Commission" and substituting "Probation System";

(B) by amending subsection (b) to read as follows:

"(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3624(a) of this title after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of section 3742 of this title apply to a sentence to a term of imprisonment under this subsection, and the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States has jurisdiction to review the period of imprisonment as though it had been imposed by the United States district court."; and

(C) by repealing subsection (c).

§ 4107. Verification of consent of offender to transfer from the United States

(a) Prior to the transfer of an offender from the United States, the fact that the offender consents

to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified by a United States magistrate or a judge as defined in section 451 of title 28, United States Code.

(b) The verifying officer shall inquire of the offender whether he understands and agrees that the transfer will be subject to the following conditions:

(1) only the appropriate courts in the United States may modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in such courts;

(2) the sentence shall be carried out according to the laws of the country to which he is to be transferred and that those laws are subject to change;

(3) if a court in the country to which he is transferred should determine upon a proceeding initiated by him or on his behalf that his transfer was not accomplished in accordance with the treaty or laws of that country, he may be returned to the United States for the purpose of completing the sentence if the United States requests his return; and

(4) his consent to transfer, once verified by the verifying officer, is irrevocable.

(c) The verifying officer, before determining that an offender's consent is voluntary and given with full knowledge of the consequences, shall advise the offender of his right to consult with counsel as provided by this chapter. If the offender wishes to consult with counsel before giving his consent, he shall be advised that the proceedings will be continued until he has had an opportunity to consult with counsel.

(d) The verifying officer shall make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements, and that the offender accepts the transfer subject to the conditions set forth in subsection (b). The consent and acceptance shall be on an appropriate form prescribed by the Attorney General.

(e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment. The Attorney General shall maintain custody of the records.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1216.)

§ 4108. Verification of consent of offender to transfer to the United States

(a) Prior to the transfer of an offender to the United States, the fact that the offender consents to such transfer and that such consent is voluntary and with full knowledge of the consequences thereof shall be verified in the country in which the sentence was imposed by a United States magistrate, or by a citizen specifically designated by a judge of the United States as defined in section 451 of title 28, United States Code. The designation of a citizen who is an employee or officer of a department or agency of the United States shall be with the approval of the head of that department or agency.

(b) The verifying officer shall inquire of the offender whether he understands and agrees that the transfer will be subject to the following conditions:

(1) only the country in which he was convicted and sentenced can modify or set aside the conviction or sentence, and any proceedings seeking such action may only be brought in that country;

(2) the sentence shall be carried out according to the laws of the United States and that those laws are subject to change;

(3) if a United States court should determine upon a proceeding initiated by him or on his behalf that his transfer was not accomplished in accordance with the treaty or laws of the United States, he may be returned to the country which imposed the sentence for the purpose of completing the sentence if that country requests his return; and

(4) his consent to transfer, once verified by the verifying officer, is irrevocable.

(c) The verifying officer, before determining that an offender's consent is voluntary and given with full knowledge of the consequences, shall advise the offender of his right to consult with counsel as provided by this chapter. If the offender wishes to consult with counsel before giving his consent, he shall be advised that the proceedings will be continued until he has had an opportunity to consult with counsel.

(d) The verifying officer shall make the necessary inquiries to determine that the offender's consent is voluntary and not the result of any promises, threats, or other improper inducements, and that the offender accepts the transfer subject to the conditions set forth in subsection (b). The consent and acceptance shall be on an appropriate form prescribed by the Attorney General.

(e) The proceedings shall be taken down by a reporter or recorded by suitable sound recording equipment. The Attorney General shall maintain custody of the records.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1217.)

Amendment of Subsec. (a)

Pub.L. 98–473, Title II, §§ 223(m)(4), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, subsec. (a) of this section is amended by adding ", including any term of imprisonment or term of supervised release specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1)," after "consequences thereof".

§ 4109. Right to counsel, appointment of counsel

In proceedings to verify consent of an offender for transfer, the offender shall have the right to advice of counsel. If the offender is financially unable to obtain counsel—

(1) counsel for proceedings conducted under section 4107 shall be appointed in accordance with the Criminal Justice Act (18 U.S.C. 3006A). Such appointment shall be considered an appointment in a misdemeanor case for purposes of compensation under the Act;

(2) counsel for proceedings conducted under section 4108 shall be appointed by the verifying officer pursuant to such regulations as may be prescribed by the Director of the Administrative Office of the United States Courts. The Secretary of State shall make payments of fees and expenses of the appointed counsel, in amounts approved by the verifying officer, which shall not exceed the amounts authorized under the Criminal Justice Act (18 U.S.C. 3006(a))[1] for representation in a misdemeanor case. Payment in excess of the maximum amount authorized may be made for extended or complex representation whenever the verifying officer certifies that the amount of the excess payment is necessary to provide fair compensation, and the payment is approved by the chief judge of the United States court of appeals for the appropriate circuit. Counsel from other agencies in any branch of the Government may be appointed: *Provided*, That in such cases the Secretary of State shall pay counsel directly, or reimburse the employing agency for travel and transportation expenses. Notwithstanding section 3324(a) and (b) of title 31, the Secretary may make advance payments of travel and transportation expenses to counsel appointed under this subsection.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1218, and amended Pub.L. 97–258, § 3(e)(2), Sept. 13, 1982, 96 Stat. 1064.)

[1] So in original. Probably should read (18 U.S.C. 3006A).

References in Text. The Criminal Justice Act referred to in text, probably means the Criminal Justice Act of 1964, which enacted section 3006A of this title.

§ 4110. Transfer of juveniles

An offender transferred to the United States because of an act which would have been an act of juvenile delinquency had it been committed in the United States or any State thereof shall be subject to the provisions of chapter 403 of this title except as otherwise provided in the relevant treaty or in an agreement pursuant to such treaty between the Attorney General and the authority of the foreign country.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1218.)

§ 4111. Prosecution barred by foreign conviction

An offender transferred to the United States shall not be detained, prosecuted, tried, or sentenced by the United States, or any State thereof for any offense the prosecution of which would have been barred if the sentence upon which the transfer was based had been by a court of the jurisdiction seeking to prosecute the transferred offender, or if prosecution would have been barred by the laws of the jurisdiction seeking to prosecute the transferred offender if the sentence on which the transfer was based had been issued by a court of the United States or by a court of another State.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1218.)

§ 4112. Loss of rights, disqualification

An offender transferred to the United States to serve a sentence imposed by a foreign court shall not incur any loss of civil, political, or civic rights nor incur any disqualification other than those which under the laws of the United States or of the State in which the issue arises would result from the fact of the conviction in the foreign country.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1218.)

§ 4113. Status of alien offender transferred to a foreign country

(a) An alien who is deportable from the United States but who has been granted voluntary departure pursuant to section 1252(b) or section 1254(e) of title 8, United States Code, and who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have voluntarily departed from this country.

(b) An alien who is the subject of an order of deportation from the United States pursuant to section 1252 of title 8, United States Code, who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been deported from this country.

(c) An alien who is the subject of an order of exclusion and deportation from the United States pursuant to section 1226 of title 8, United States Code, who is transferred to a foreign country pursuant to this chapter shall be deemed for all purposes to have been excluded from admission and deported from the United States.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1219.)

§ 4114. Return of transferred offenders

(a) Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall be no longer than thirty days.

(b) Upon receiving a request from the sentencing country that the offender ordered released be returned for the completion of his sentence, the Attorney General may file a complaint for the return of the offender with any justice or judge of the United States or any authorized magistrate within whose jurisdiction the offender is found. The complaint shall be upon oath and supported by affidavits establishing that the offender was convicted and sentenced by the courts of the country to which his return is requested; the offender was transferred to the United States for the execution of his sentence; the offender was ordered released by a court of the United States before he had completed his sentence because the transfer of the offender was not in accordance with the treaty or the laws of the United States; and that the sentencing country has requested that he be returned for the completion of the sentence. There shall be attached to the complaint a copy of the sentence of the sentencing court and of the decision of the court which ordered the offender released.

A summons or a warrant shall be issued by the justice, judge or magistrate ordering the offender to appear or to be brought before the issuing authority. If the justice, judge, or magistrate finds that the person before him is the offender described in the complaint and that the facts alleged in the complaint are true, he shall issue a warrant for commitment of the offender to the custody of the Attorney General until surrender shall be made. The findings and a copy of all the testimony taken before him and of all documents introduced before him shall be transmitted to the Secretary of State, that a Return Warrant may issue upon the requisition of the proper authorities of the sentencing country, for the surrender of offender.

(c) A complaint referred to in subsection (b) must be filed within sixty days from the date on which the decision ordering the release of the offender becomes final.

(d) An offender returned under this section shall be subject to the jurisdiction of the country to which he is returned for all purposes.

(e) The return of an offender shall be conditioned upon the offender being given credit toward service of the sentence for the time spent in the custody of or under the supervision of the United States.

(f) Sections 3186, 3188 through 3191, and 3195 of this title shall be applicable to the return of an offender under this section. However, an offender returned under this section shall not be deemed to have been extradited for any purpose.

(g) An offender whose return is sought pursuant to this section may be admitted to bail or be released on his own recognizance at any stage of the proceedings.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1219.)

§ 4115. Execution of sentences imposing an obligation to make restitution or reparations

If in a sentence issued in a penal proceeding of a transferring country an offender transferred to the United States has been ordered to pay a sum of money to the victim of the offense for damage caused by the offense, that penalty or award of damages may be enforced as though it were a civil judgment rendered by a United States district court. Proceedings to collect the moneys ordered to be paid may be instituted by the Attorney General in any United States district court. Moneys recovered pursuant to such proceedings shall be transmitted through diplomatic channels to the treaty authority of the transferring country for distribution to the victim.

(Added Pub.L. 95–144, § 1, Oct. 28, 1977, 91 Stat. 1220.)

CHAPTER 307—EMPLOYMENT

Sec.

4121. Federal Prison Industries; board of directors.
4122. Administration of Federal Prison Industries.
4123. New industries.
4124. Purchase of prison-made products by Federal departments.
4125. Public works; prison camps.
4126. Prison Industries fund; use and settlement of accounts.
4127. Prison Industries report to Congress.
4128. Enforcement by Attorney General.

§ 4121. Federal Prison Industries; board of directors

"Federal Prison Industries", a government corporation of the District of Columbia, shall be administered by a board of six directors, appointed by the President to serve at the will of the President without compensation.

The directors shall be representatives of (1) industry, (2) labor, (3) agriculture, (4) retailers and consumers, (5) the Secretary of Defense, and (6) the Attorney General, respectively.

(As amended May 24, 1949, c. 139, § 62, 63 Stat. 98.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 744i, 744j (June 23, 1934, ch. 736, §§ 1, 2, 48 Stat. 1211).

Section consolidates sections 744i and 744j of title 18, U.S.C., 1940 ed. The former was rewritten omitting unnecessary recital as to policy and expressing the original language of the two sections more logically.

Changes were made in transportation and phraseology.

1949 ACT

This section [section 62] incorporates in section 4121 of title 18, U.S.C, with changes in phraseology, the provisions of section 3 of act of June 29, 1948 (ch. 719, 62 Stat. 1100), which was enacted subsequent to the enactment of the revision of title 18 and which provided for appointment of an additional member of the board of directors of the Federal Prison Industries, as a representative of the Secretary of Defense.

§ 4122. Administration of Federal Prison Industries

(a) Federal Prison Industries shall determine in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions or for sale to the departments or agencies of the United States, but not for sale to the public in competition with private enterprise.

(b) Its board of directors shall provide employment for all physically fit inmates in the United States penal and correctional institutions, diversify, so far as practicable, prison industrial operations and so operate the prison shops that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops, and to reduce to a minimum competition with private industry or free labor.

(c) Its board of directors may provide for the vocational training of qualified inmates without regard to their industrial or other assignments.

(d)(1) The provisions of this chapter shall apply to the industrial employment and training of prisoners convicted by general courts-martial and confined in any institution under the jurisdiction of any department or agency comprising the Department of Defense, to the extent and under terms and conditions agreed upon by the Secretary of Defense, the Attorney General and the Board of Directors of Federal Prison Industries.

(2) Any department or agency of the Department of Defense may, without exchange of funds, transfer to Federal Prison Industries any property or equipment suitable for use in performing the functions and duties covered by agreement entered into under paragraph (1) of this subsection.

(e)(1) The provisions of this chapter shall apply to the industrial employment and training of prisoners confined in any penal or correctional institution under the direction of the Commissioner of the District of Columbia to the extent and under terms and conditions agreed upon by the Commissioner, the Attorney General, and the Board of Directors of Federal Prison Industries.

(2) The Commissioner of the District of Columbia may, without exchange of funds, transfer to the Federal Prison Industries any property or equipment suitable for use in performing the functions and duties covered by an agreement entered into under subsection (e)(1) of this section.

(3) Nothing in this chapter shall be construed to affect the provisions of the Act approved October 3, 1964 (D.C.Code, sections 24–451 et seq.), entitled "An Act to establish in the Treasury a correctional industries fund for the government of the District of Columbia, and for other purposes."

(As amended May 24, 1949, c. 139, § 63, 63 Stat. 98; Oct. 31, 1951, c. 655, § 31, 65 Stat. 722; Dec. 27, 1967, Pub.L. 90–226, Title VIII, § 802, 81 Stat. 741.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 18, U.S.C., 1940 ed., §§ 744a, 744c, 744k (May 27, 1930, ch. 340, §§ 1, 3, 46 Stat. 391; June 23, 1934, ch. 736, § 3, 48 Stat. 1211).

Section consolidates sections 744a, part of 744c, and 744k of title 18, U.S.C., 1940 ed., with such changes of phraseology as were necessary to effect the consolidation.

Provisions in section 744k of title 18, U.S.C., 1940 ed., for transfer of duties to the corporation was omitted as executed.

Other provisions of said section 744c of title 18, U.S.C., 1940 ed., form section 4123 of this title.

Changes were made in phraseology.

1949 ACT

Subsection (c) of section 4122 of title 18, U.S.C., as added by this amendment [see section 63], incorporates

provisions of act of May 11, 1948 (ch. 276, 62 Stat. 230), which was not incorporated in title 18 when the revision was enacted. The remainder of such act is incorporated in section 4126 of such title by another section of this bill.

Subsections (d) and (e) of such section 4122, added by this amendment [see section 63], incorporate, with changes in phraseology, the provisions of sections 1 and 2 of act of June 29, 1948 (ch. 719, 62 Stat. 1100), extending the functions and duties of Federal Prisons Industries.[sic] Incorporated, to military disciplinary barracks. Section 3 of such act is incorporated in section 4121 of such title by another section of this bill, and section 4 of such act is classified to section 1621a of title 50, U.S.C., Appendix, War and National Defense.

Transfer of Functions. The Office of Commissioner of the District of Columbia was abolished and replaced by the Office of Mayor of the District of Columbia.

§ 4123. New industries

Any industry established under this chapter shall be so operated as not to curtail the production of any existing arsenal, navy yard, or other Government workshop.

Such forms of employment shall be provided as will give the inmates of all Federal penal and correctional institutions a maximum opportunity to acquire a knowledge and skill in trades and occupations which will provide them with a means of earning a livelihood upon release.

The industries may be either within the precincts of any penal or correctional institution or in any convenient locality where an existing property may be obtained by lease, purchase, or otherwise.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 744c (May 27, 1930, ch. 340, § 3, 46 Stat. 391).

A part of said section 744c of title 18, U.S.C., 1940 ed., is incorporated in section 4122 of this title.

References to the Attorney General were omitted because section 744k of title 18, U.S.C., 1940 ed., as originally enacted, provided for the transfer to Federal Prison Industries of the powers and duties then vested in the Attorney General.

References to "this chapter" were substituted for "this section" since the general authority to establish and supervise prison industries is contained in this chapter.

Minor changes of phraseology were made.

§ 4124. Purchase of prison-made products by Federal departments

The several Federal departments and agencies and all other Government institutions of the United States shall purchase at not to exceed current market prices, such products of the industries authorized by this chapter as meet their requirements and may be available.

Disputes as to the price, quality, character, or suitability of such products shall be arbitrated by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the President, or their representatives. Their decision shall be final and binding upon all parties.

(As amended Oct. 31, 1951, c. 655, § 32, 65 Stat. 723; Feb. 14, 1984, Pub.L. 98-216, § 3(b)(2), 98 Stat. 6.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 744g (May 27, 1930, ch. 340, § 7, 46 Stat. 392).

The revised section substituted the Director of the Bureau of Federal Supply of the Treasury Department for the General Supply Committee, the functions of the latter having been transferred to the Procurement Division of the Treasury Department by Executive Order No. 6166, § 1, June 10, 1933, and the name of that unit having been changed to Bureau of Federal Supply by order of the Secretary of the Treasury effective January 1, 1947, 11 Federal Register No. 13,638. The Bureau of the Budget was substituted for the Bureau of Efficiency which was abolished by Act of March 3, 1933, ch. 212, § 17, 47 Stat. 1519, without transferring its functions elsewhere. However, the Bureau of the Budget performs similar duties and its Director logically should serve on the arbitration board.

Reference to authority for appropriations was omitted and words "by this chapter" substituted therefor.

The word "agencies" was substituted for "independent establishments" to avoid any possibility of ambiguity. See definition of "agency" in section 6 of this title.

Transfer of Functions. All functions vested by law in the Bureau of the Budget or the Director thereof were transferred to the President of the United States, the Bureau was redesignated the Office of Management and Budget, and all records, property, personnel, and funds of the Bureau were transferred to the Office of Management and Budget.

§ 4125. Public works; prison camps

(a) The Attorney General may make available to the heads of the several departments the services of United States prisoners under terms, conditions, and rates mutually agreed upon, for constructing or repairing roads, clearing, maintaining and reforesting public lands, building levees, and constructing or repairing any other public ways or works financed wholly or in major part by funds appropriated by Congress.

(b) The Attorney General may establish, equip, and maintain camps upon sites selected by him elsewhere than upon Indian reservations, and designate such camps as places for confinement of persons convicted of an offense against the laws of the United States.

(c) The expenses of transferring and maintaining prisoners at such camps and of operating such camps shall be paid from the appropriation "Sup-

port of United States prisoners", which may, in the discretion of the Attorney General, be reimbursed for such expenses.

(d) As part of the expense of operating such camps the Attorney General is authorized to provide for the payment to the inmates or their dependents such pecuniary earnings as he may deem proper, under such rules and regulations as he may prescribe.

(e) All other laws of the United States relating to the imprisonment, transfer, control, discipline, escape, release of, or in any way affecting prisoners, shall apply to prisoners transferred to such camps.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 744b, 851, 853, 854, 855 (Feb. 26, 1929, ch. 336, §§ 1, 3, 4, 5, 45 Stat. 1318; May 27, 1930, ch. 340, § 2, 46 Stat. 391).

Section consolidates section 744b of title 18, U.S.C., 1940 ed., with those portions of sections 851, 853–855 of title 18, U.S.C., 1940 ed., which may not have been superseded by section 744b of said title.

Section 851 of title 18, U.S.C., 1940 ed., was superseded except for the proviso which formed the basis for the added words "elsewhere than upon Indian reservations".

Section 855 of title 18, U.S.C., 1940 ed., was superseded by section 744b of title 18, U.S.C., 1940 ed., except as to the specific mention in section 855 of said title of expense for maintenance and operation of camps. Hence a reference to operation was added in subsection (c) of this section.

Section 854 of title 18, U.S.C., 1940 ed., was added as a part of subsection (c).

Section 853 of title 18, U.S.C., 1940 ed., was added as subsection (d) of this section, although its retention may be unnecessary.

The phrase "the cost of which is borne exclusively by the United States" which followed the words "constructing or repairing roads" was omitted as inconsistent with the later phrase "constructing or repairing any other public ways or works financed wholly or in major part by funds appropriated from the Treasury of the United States."

The provision for transfer of prisoners was omitted as duplicitous of a similar provision in section 4082 of this title.

Other changes of phraseology were made.

§ 4126. Prison Industries Fund; use and settlement of accounts

All moneys under the control of Federal Prison Industries, or received from the sale of the products or by-products of such Industries, or for the services of federal prisoners, shall be deposited or covered into the Treasury of the United States to the credit of the Prison Industries Fund and withdrawn therefrom only pursuant to accountable warrants or certificates of settlement issued by the General Accounting Office.

All valid claims and obligations payable out of said fund shall be assumed by the corporation.

The corporation, in accordance with the laws generally applicable to the expenditures of the several departments and establishments of the government, is authorized to employ the fund, and any earnings that may accrue to the corporation, as operating capital in performing the duties imposed by this chapter; in the repair, alteration, erection and maintenance of industrial buildings and equipment; in the vocational training of inmates without regard to their industrial or other assignments; in paying, under rules and regulations promulgated by the Attorney General, compensation to inmates employed in any industry, or performing outstanding services in institutional operations, and compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined. In no event shall compensation be paid in a greater amount than that provided in the Federal Employees' Compensation Act.

Accounts of all receipts and disbursements of the corporation shall be rendered to the General Accounting Office for settlement and adjustment, as required by the Comptroller General.

Such accounting shall include all fiscal transactions of the corporation, whether involving appropriated moneys, capital, or receipts from other sources.

(As amended May 24, 1949, c. 139, § 64, 63 Stat. 99; Sept. 26, 1961, Pub.L. 87–317, 75 Stat. 681.)

HISTORICAL AND REVISION NOTES

1949 ACT

Based on title 18, U.S.C., 1940 ed., §§ 744d, 744e, 744f, 744*l* (May 27, 1930, ch. 340, §§ 4–6, 46 Stat. 391, 392; June 23, 1934, ch. 736, § 4, 48 Stat. 1211).

This section is a restatement of section 744*l* of title 18, U.S.C., 1940 ed., with which sections 744d and 744f and the first sentence of section 744e of title 18, U.S.C., 1940 ed., are consolidated, in view of the fact that those provisions have been superseded by section 744*l* of title 18, U.S.C., 1940 ed., in connection with other provisions of the act of June 23, 1934, ch. 736, 48 Stat. 1211.

The first sentence of section 744*l* of title 18, U.S.C., 1940 ed., authorizing replacement of the prison industries working capital fund by the prison industries fund was omitted, as executed. That provision superseded section 744d of title 18, U.S.C., 1940 ed., which authorized creation of the prison industries working capital fund and the first sentence of section 744e of title 18, U.S.C., 1940 ed., directing that certain funds should be credited to the consolidated prison industries working capital fund.

The phrase "or received from the sale of the products or by-products of such Industries, or for the services of

Federal prisoners," was inserted to make the first paragraph of this section complete, and required the Federal Prison Industries to account for all moneys under its control.

The words "in the repair, alteration, erection and maintenance of industrial buildings and equipment" and "under rules and regulations promulgated by the Attorney General in paying compensation to inmates employed in any industry, or performing outstanding services in industrial operations" were inserted in part to conform to administrative construction, and in part to provide greater flexibility in the operation of Prison Industries. Much friction was caused by the inability of Prison Industries to compensate inmates whose services in operating the utilities of the institution were most necessary but which were uncompensated while those prisoners who worked in the Industries received compensation. This inequitable situation is corrected by the revised section.

The words "in performing the duties imposed by this chapter" were substituted for the words "for the purposes enumerated in sections 744a–744h of this title," since the provisions with regard to prison industries now appear in this chapter. The general provisions as to use of the fund supersede the more specific provisions of section 744f of said title (enacted earlier).

A reference to the Federal Employees' Compensation Act as appeared in the 1934 act was substituted for the reference to specific sections of title 5. The word "law" was substituted for the reference to sections in title 31 since translation of the reference in the 1934 act was not practicable.

Remaining provisions of said section 744e of title 18, U.S.C., 1940 ed., relating to authorization of appropriations, were omitted as unnecessary.

Other changes in phraseology were made.

1949 Act

This section [section 64] incorporates in section 4126 of title 18, U.S.C., provisions of act of May 11, 1948 (ch. 276, 62 Stat. 230), which was not incorporated in title 18 when the revision was enacted. The remainder of such act is incorporated in section 4122 of such title by another section of this bill.

References in Text. The Federal Employees' Compensation Act, referred to in text, was repealed and the provisions thereof reenacted as subchapter I of chapter 81 of Title 5, U.S.C.A., Government Organization and Employees.

§ 4127. Prison Industries report to Congress

The board of directors of Federal Prison Industries shall make annual reports to Congress on the conduct of the business of the corporation and on the condition of its funds.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 744m (June 23, 1934, ch. 736, § 5, 48 Stat. 1212).

Words "of Federal Prison Industries" were inserted after "board of directors".

Minor changes were made in phraseology.

§ 4128. Enforcement by Attorney General

In the event of any failure of Federal Prison Industries to act, the Attorney General shall not be limited in carrying out the duties conferred upon him by law.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 744n (June 23, 1934, ch. 736, § 6, 48 Stat. 1212).

Phrase relating to section being "supplemental" to sections 744i–744h of title 18, U.S.C., 1940 ed., is omitted as unnecessary.

Retention of remainder of section is essential to insure authority of Attorney General to require performance of duties of Prison Industries. (See sections 4001 and 4003 of this title.) This is also consistent with 1939 Reorganization Plan No. II, § 3(a), transferring the corporation to the Department of Justice "under the general direction and supervision of the Attorney General". (See section 133t of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.)

Words "Federal Prison Industries" were substituted for "the corporation".

CHAPTER 309—GOOD TIME ALLOWANCES

Sec.

4161. Computation generally.
4162. Industrial good time.
4163. Discharge.
4164. Released prisoner as parolee.
4165. Forfeiture for offense.
4166. Restoration of forfeited commutation.

§ 4161. Computation generally

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

(As amended Sept. 14, 1959; Pub.L. 86–259, 73 Stat. 546.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(4), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 710, 710a (June 21, 1902, ch. 1140, § 1, 32 Stat. 397; June 29, 1932, ch. 310, § 2, 47 Stat. 381).

This section consolidates sections 710 and 710a of title 18, U.S.C., 1940 ed., with changes of substance and phraseology. The language of said section 710a making the good time allowance coincide with the beginning date of the sentence instead of arrival at the institution was adopted for several reasons: (1) This provision is now 12 years old and is controlling on all sentences imposed since July 29, 1932, which means all sentences except those for life or in excess of 15 years; (2) the very small additional allowances which will accrue to these older prisoners are insignificant in comparison with the benefits resulting from a single system of computation.

Words "penal or correctional institution" were substituted for "penitentiary or jail" for clarity and completeness, on recommendation of the Department of Justice.

Word "consecutive" was inserted before "sentences," in final paragraph, for clarity.

Words "to be credited as earned, and computed monthly as follows" were inserted in the first paragraph to clarify the language and permit the Bureau of Prisons to credit good time only as it is earned, and to reverse an administrative practice which heretofore has credited to the inmate upon his entry into the institution all the good time which would be earned throughout his entire sentence. Upon misconduct requiring forfeiture of good time allowance the prisoner suffered the loss of both earned and unearned good time. Consequently he had no incentive to good behavior. The Bureau of Prisons strongly recommended the change made in this revised section.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title

§ 4162. Industrial good time

A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(4), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 744h (May 27, 1930, ch. 340, § 8, 46 Stat. 392).

Words "authority of sections 744b and 744c" were omitted. When this section was enacted those sections were the only general sections providing for camps and industries. However section 744k of title 18, U.S.C., 1940 ed., now authorizes establishment of prison industries. There appears to have been no intent to grant industrial good time to prisoners in one industry and deny it to prisoners engaged in an industry set up under another section. (See ch. 307 of this title.)

Words "providing for commutation of sentences of United States prisoners for good conduct," at beginning of section, were omitted as unnecessary.

The second paragraph is new. It was added for the same reasons for which compensation is provided for similar service by section 4126 of this title and explained in the reviser's note thereto, which see.

Changes were made in phraseology and arrangement.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4163. Discharge

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. If such release date falls on a holiday which falls other than on a Saturday, Sunday, or Monday, the prisoner may be released at the discretion of the warden or keeper on the day preceding the holiday.

(As amended Sept. 19, 1962, Pub.L. 87–665, 76 Stat. 552.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(4), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 713 (R.S. §§ 5543, 5544; Mar. 3, 1875, ch. 145, § 1, 18 Stat. 479; Mar. 3, 1891, ch. 529, § 8, 26 Stat. 840).

The reference to section 710 of title 18, U.S.C., 1940 ed., which section is now incorporated in section 4161 of this title, was not referred to in act March 3, 1875, and was omitted.

Last sentence of said section 713 was omitted and incorporated in section 4165 of this title.

Changes were made in phraseology.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4164. Released prisoner as parolee

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

(As amended June 29, 1951, c. 176, 65 Stat. 98.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(4), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., 716b (June 29, 1932, ch. 310, § 4, 47 Stat. 381).

Minor changes were made in phraseology.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4165. Forfeiture for offense

If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time may be forfeited.

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(4), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 713 (R.S. §§ 5543, 5544; Mar. 3, 1875, ch. 145, § 1, 18 Stat. 479; Mar. 3, 1891, ch. 529, § 8, 26 Stat. 840).

First sentence of said section 713 of title 18, U.S.C., 1940 ed., is incorporated in section 4163 of this title.

Section was rewritten. The words "or violates the rules of the institution" and "all or any part of his earned good time" are new and are inserted in lieu of the mandatory requirement for forfeiture of good time upon conviction for an offense committed during imprisonment. The section as revised is more flexible and will promote better administration without working any undesirable change of substance.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4166. Restoration of forfeited commutation

The Attorney General may restore any forfeited or lost good time or such portion thereof as he deems proper upon recommendation of the Director of the Bureau of Prisons.

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(4), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 711 (June 21, 1902, ch. 1140, § 2, 32 Stat. 397).

The words "of the Director of the Bureau of Prisons" were substituted for the words "and evidence submitted to him by the warden in charge" without change of substance. The requirement that restoration in the case of federal prisoners confined in state and territorial institutions shall be in accordance with the rules of such institution were omitted as unnecessary and in any event not applicable in any case in which transfer may be indicated.

Changes were made in phraseology and arrangement.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

CHAPTER 311—PAROLE

Sec.

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Effective Date of Amendment. Amendment of item 4215 effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98–473.

§ 4201. Definitions

As used in this chapter—

(1) "Commission" means the United States Parole Commission;

(2) "Commissioner" means any member of the United States Parole Commission;

(3) "Director" means the Director of the Bureau of Prisons;

(4) "Eligible prisoner" means any Federal prisoner who is eligible for parole pursuant to this title or any other law including any Federal prisoner whose parole has been revoked and who is not otherwise ineligible for parole;

(5) "Parolee" means any eligible prisoner who has been released on parole or deemed as if released on parole under section 4164 or section 4205(f); and

(6) "Rules and regulations" means rules and regulations promulgated by the Commission pursuant to section 4203 and section 553 of title 5, United States Code.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 219.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4201, Acts June 25, 1948, c. 645, 62 Stat. 854; Sept. 30, 1950, c. 1115, § 1, 64 Stat. 1085; Sept. 6, 1958, Pub.L. 85–928, 72 Stat. 1783; Oct. 4, 1961, Pub.L. 87–367, Title III, § 302(b)(1), (a), 75 Stat. 793, providing for the creation of, members to, and term of office of the Board of Parole, was repealed by section 2 of Pub.L. 94–233 as part of the general revision of this chapter by Pub.L. 94–233.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4202. Parole Commission created

There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate. The President shall designate from among the Commissioners one to serve as Chairman. The term of office of a Commissioner shall be six years, except that the term of a person appointed as a Commissioner to fill a vacancy shall expire six years from the date upon which such person was appointed and qualified. Upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 219.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4202, Acts June 25, 1948, c. 645, 62 Stat. 854; July 31, 1951, c. 277, 65 Stat. 150, providing for the eligibility of prisoners for parole, was repealed by section 2 of Pub.L. 94–233 as part of the general revision of this chapter by Pub.L. 94–233.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Terms of Members of U.S. Parole Commission. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4203. Powers and duties of the Commission

(a) The Commission shall meet at least quarterly, and by majority vote shall—

(1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

(2) create such regions as are necessary to carry out the provisions of this chapter, but in no event less than five; and

(3) ratify, revise, or deny any request for regular, supplemental, or deficiency appropriations, prior to the submission of the requests to the Office of Management and Budget by the Chairman, which requests shall be separate from those of any other agency of the Department of Justice.

(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to—

(1) grant or deny an application or recommendation to parole any eligible prisoner;

(2) impose reasonable conditions on an order granting parole;

(3) modify or revoke an order paroling any eligible prisoner; and

(4) request probation officers and other individuals, organizations, and public or private

agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision of and assistance to such parolees; and so as to assure that no probation officers, individuals, organizations, or agencies shall bear excessive caseloads.

(c) The Commission, by majority vote, and pursuant to rules and regulations—

(1) may delegate to any Commissioner or commissioners powers enumerated in subsection (b) of this section;

(2) may delegate to hearing examiners any powers necessary to conduct hearings and proceedings, take sworn testimony, obtain and make a record of pertinent information, make findings of probable cause and issue subpenas for witnesses or evidence in parole revocation proceedings, and recommend disposition of any matters enumerated in subsection (b) of this section, except that any such findings or recommendations shall be based upon the concurrence of not less than two hearing examiners;

(3) may delegate authority to conduct hearings held pursuant to section 4214 to any officer or employee of the executive or judicial branch of Federal or State government; and

(4) may review, or may delegate to the National Appeals Board the power to review, any decision made pursuant to subparagraph (1) of this subsection except that any such decision so reviewed must be reaffirmed, modified or reversed within thirty days of the date the decision is rendered, and, in case of such review, the individual to whom the decision applies shall be informed in writing of the Commission's actions with respect thereto and the reasons for such actions.

(d) Except as otherwise provided by law, any action taken by the Commission pursuant to subsection (a) of this section shall be taken by a majority vote of all individuals currently holding office as members of the Commission which shall maintain and make available for public inspection a record of the final vote of each member on statements of policy and interpretations adopted by it. In so acting, each Commissioner shall have equal responsibility and authority, shall have full access to all information relating to the performance of such duties and responsibilities, and shall have one vote.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 220.)

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4203, Acts June 25, 1948, c. 645, 62 Stat. 854; Oct. 22, 1970, Pub.L. 91-492, § 2, 84 Stat. 1090; May 11, 1972, Pub.L. 92-293, § 2, 86 Stat. 136, providing for the application and release of parolees and the terms and conditions of such release, was repealed by section 2 of Pub.L. 94-233 as part of the general revision of this chapter by Pub.L. 94-233.

Savings Provisions of Pub.L. 98-473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4204. Powers and duties of the Chairman

(a) The Chairman shall—

(1) convene and preside at meetings of the Commission pursuant to section 4203 and such additional meetings of the Commission as the Chairman may call or as may be requested in writing by at least three Commissioners;

(2) appoint, fix the compensation of, assign, and supervise all personnel employed by the Commission except that—

(A) the appointment of any hearing examiner shall be subject to approval of the Commission within the first year of such hearing examiner's employment; and

(B) regional Commissioners shall appoint and supervise such personnel employed regularly and full time in their respective regions as are compensated at a rate up to and including grade 9 of the General Schedule pay rates (5 U.S.C. 5332);

(3) assign duties among officers and employees of the Commission, including Commissioners, so as to balance the workload and provide for orderly administration;

(4) direct the preparation of requests for appropriations for the Commission, and the use of funds made available to the Commission;

(5) designate three Commissioners to serve on the National Appeals Board of whom one shall be so designated to serve as vice chairman of the Commission (who shall act as Chairman of the Commission in the absence or disability of the Chairman or in the event of the vacancy of the Chairmanship), and designate, for each such region established pursuant to section 4203, one Commissioner to serve as regional Commissioner in each such region; except that in each such designation the Chairman shall consider years of service, personal preference and fitness, and no such designation shall take effect unless concurred in by the President, or his designee;

(6) serve as spokesman for the Commission and report annually to each House of Congress on the activities of the Commission; and

(7) exercise such other powers and duties and perform such other functions as may be neces-

sary to carry out the purposes of this chapter or as may be provided under any other provision of law.

(b) The Chairman shall have the power to—

(1) without regard to section 3324(a) and (b) of title 31, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

(2) accept voluntary and uncompensated services, notwithstanding the provisions of section 1342 of title 31;

(3) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

(4) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the parole process;

(5) carry out programs of research concerning the parole process to develop classification systems which describe types of offenders, and to develop theories and practices which can be applied to the different types of offenders;

(6) publish data concerning the parole process;

(7) devise and conduct, in various geographical locations, seminars, workshops and training programs providing continuing studies and instruction for personnel of Federal, State and local agencies and private and public organizations working with parolees and connected with the parole process; and

(8) utilize the services, equipment, personnel, information, facilities, and instrumentalities with or without reimbursement therefor of other Federal, State, local, and private agencies with their consent.

(c) In carrying out his functions under this section, the Chairman shall be governed by the national parole policies promulgated by the Commission. (Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 221, and amended Pub.L. 97-258, § 3(e)(3), (4), Sept. 13, 1982, 96 Stat. 1064.)

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4204, Act June 25, 1948, c. 645, 62 Stat. 854, providing for the parole of aliens, was repealed by section 2 of Pub.L. 94-233 as part of the general revision of this chapter by Pub.L. 94-233. See section 4212 of this title.

Savings Provisions of Pub.L. 98-473, Title II, c. II. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

EXECUTIVE ORDER NO. 11919

June 9, 1976, 41 F.R. 23663

DELEGATION OF PRESIDENTIAL AUTHORITY TO CONCUR IN DESIGNATIONS OF COMMISSIONERS

By virtue of the authority vested in me by section 301 of title 3, United States Code [section 301 of Title 3, The President], and section 4204(a)(5) of title 18, United States Code, as enacted by the Parole Commission and Reorganization Act (Public Law 94-233) [subsec. (a)(5) of this section], and as President of the United States of America, it is hereby ordered that the Attorney General shall serve as the President's designee for purposes of concurring in designations of Commissioners of the United States Parole Commission to serve on the National Appeals Board, as vice chairman of the Commission, and as regional Commissioner.

GERALD R. FORD

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

(c) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (d) of this section. The results of such study, together with any recommendations which the Director of the Bureau of

Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) place the offender on probation as authorized by section 3651; or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from the date of original commitment under this section.

(d) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsections (a) or (b) of this section, the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the Commission a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The Commission may make such other investigation as it may deem necessary.

(e) Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not incompatible with the public interest, their views and recommendation with respect to any matter within the jurisdiction of the Commission.

(f) Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year shall be released at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

(g) At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

(h) Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 222.)

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4205, Act June 25, 1948, c. 645, 62 Stat. 854, providing for the retaking under warrant of parole violators, was repealed by section 2 of Pub.L. 94-233 as part of the general revision of this chapter by Pub.L. 94-233. See section 4213 of this title.

Savings Provisions of Pub.L. 98-473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided,* That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term

or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 223.)

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4206, Act June 25, 1948, c. 645, 62 Stat. 855, providing for the authority of Federal officers of penal or correctional institutions to execute parole violation warrants, was repealed by section 2 of Pub.L. 94-233 as part of the general revision of this chapter by Pub.L. 94-233.

Savings Provisions of Pub.L. 98-473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4207. Information considered

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge;

(5) a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim; and

(5)[1] reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 224, and amended Pub.L. 98-473, Title II, § 1408(a), Oct. 12, 1984, 98 Stat. 2177.)

[1] So in original. Two paragraphs (5) have been enacted.

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4207, Act June 25, 1948, c. 645, 62 Stat. 855, providing for an appearance before the Board of Parole for parole violators before termination or modification of parole, was repealed by section 2 of Pub.L. 94-233 as part of the general revision of this chapter by Pub.L. 92-233. See section 4214 of this title.

Effective Date of 1984 Amendment. Amendment of section effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98-473.

Savings Provisions of Pub.L. 98-473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4208. Parole determination proceeding; time

(a) In making a determination under this chapter (relating to parole) the Commission shall conduct a parole determination proceeding unless it determines on the basis of the prisoner's record that the prisoner will be released on parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsections (a) and (b)(1) of section 4205 shall be held not later than thirty days before the date of such eligibility for parole. Whenever feasible, the initial parole determination proceeding for a prisoner eligible for parole pursuant to subsection (b)(2) of section 4205 or released on parole and whose parole has been revoked shall be held not later than one hundred and twenty days following such prisoner's imprisonment or reimprisonment in a Federal institution, as the case may be. An eligible prisoner may knowingly and intelligently waive any proceeding.

(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with (1) written notice of the time and place of the proceeding, and (2) reasonable access to a report or other document to be used by the Commission in making its determination. A prisoner may waive such notice, except that if notice is not waived the proceeding shall be held during the next regularly scheduled proceedings by the Commission at the institution in which the prisoner is confined.

(c) Subparagraph (2) of subsection (b) shall not apply to—

(1) diagnostic opinions which, if made known to the eligible prisoner, could lead to a serious disruption of his institutional program;

(2) any document which reveals sources of information obtained upon a promise of confidentiality; or

(3) any other information which, if disclosed, might result in harm, physical or otherwise, to any person.

If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate.

(d)(1) During the period prior to the parole determination proceeding as provided in subsection (b) of this section, a prisoner may consult, as provided by the director, with a representative as referred to in subparagraph (2) of this subsection, and by mail or otherwise with any person concerning such proceeding.

(2) The prisoner shall, if he chooses, be represented at the parole determination proceeding by a representative who qualifies under rules and regulations promulgated by the Commission. Such rules shall not exclude attorneys as a class.

(e) The prisoner shall be allowed to appear and testify on his own behalf at the parole determination proceeding.

(f) A full and complete record of every proceeding shall be retained by the Commission. Upon request, the Commission shall make available to any eligible prisoner such record as the Commission may retain of the proceeding.

(g) If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding.

(h) In any case in which release on parole is not granted, subsequent parole determination proceedings shall be held not less frequently than:

(1) eighteen months in the case of a prisoner with a term or terms of more than one year but less than seven years; and

(2) twenty-four months in the case of a prisoner with a term or terms of seven years or longer.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 224.)

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4208, added Pub.L. 85-752, § 3, Aug. 25, 1958, 72 Stat. 845, providing for the fixing of eligibility for parole by court at time of sentencing, was repealed by section 2 of Pub.L. 94-233 as part of the general revision of this chapter by Pub.L. 94-233.

Savings Provisions of Pub.L. 98-473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4209. Conditions of parole

(a) In every case, the Commission shall impose as conditions of parole that the parolee not commit another Federal, State, or local crime and, if a fine was imposed, that the parolee make a diligent effort to pay the fine in accordance with the judgment. The Commission may impose or modify other conditions of parole to the extent that such conditions are reasonably related to—

(1) the nature and circumstances of the offense; and

(2) the history and characteristics of the parolee;

and may provide for such supervision and other limitations as are reasonable to protect the public welfare.

(b) The conditions of parole should be sufficiently specific to serve as a guide to supervision and conduct, and upon release on parole the parolee shall be given a certificate setting forth the conditions of his parole. An effort shall be made to make certain that the parolee understands the conditions of his parole.

(c) Release on parole or release as if on parole may as a condition of such release require—

(1) a parolee to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of such parole;

(2) a parolee, who is an addict within the meaning of section 4251(a), or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), to participate in the community supervision programs authorized by section 4255 for all or part of the period of parole.

A parolee residing in a residential community treatment center pursuant to subparagraph (1) or (2) of this subsection, may be required to pay such costs incident to residence as the Commission deems appropriate.

(d)(1) The Commission may modify conditions of parole pursuant to this section on its own motion, or on the motion of a United States probation officer supervising a parolee: *Provided*, That the parolee receives notice of such action and has ten

days after receipt of such notice to express his views on the proposed modification. Following such ten-day period, the Commission shall have twenty-one days, exclusive of holidays, to act upon such motion or application.

(2) A parolee may petition the Commission on his own behalf for a modification of conditions pursuant to this section.

(3) The provisions of this subsection shall not apply to modifications of parole conditions pursuant to a revocation proceeding under section 4214.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 225, and amended Pub.L. 98–596, § 7, Oct. 30, 1984, 98 Stat. 3138.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Amendment of Subsec. (a)

Pub.L. 98–473, Title II, §§ 235, 238(e), Oct. 12, 1984, 98 Stat. 2031, 2039, provided that, effective Nov. 1, 1986, subsec. (a) of this section is amended by striking out the period at the end of the first sentence and inserting in lieu thereof "and, in a case involving a criminal fine that has not already been paid, that the parolee pay or agree to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense.".

See Codification note below.

Codification. Pub.L. 98–596, § 12(a)(5), Oct. 30, 1984, 98 Stat. 3139, restored the sentence which Pub.L. 98–473 had amended (see Amendment of Subsec. (a) note above), effective Oct. 12, 1984, pursuant to section 12(b) of Pub.L. 98–596. This amendment was not executed to text since the identical language was presently in text. This amendment was a probable attempt to restore the text of subsec. (a) of this section which was amended by Pub.L. 98–473, Title II, c. II, § 238(e), Oct. 12, 1984, 98 Stat. 2039, effective, however, on Nov. 1, 1986.

Prior Provisions. A prior section 4209, added Pub.L. 85–752, § 4, Aug. 25, 1958, 72 Stat. 846, providing for treatment of a defendant as a young adult offender, was repealed by section 2 of Pub.L. 94–233 as a part of the general revision of this chapter by Pub.L. 94–233. See section 4216 of this title.

Effective Date of 1984 Amendment. Amendment of this section by section 7 of Pub.L. 98–596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub.L. 98–596 set out as a note under section 1 of this title.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4210. Jurisdiction of Commission

(a) A parolee shall remain in the legal custody and under the control of the Attorney General, until the expiration of the maximum term or terms for which such parolee was sentenced.

(b) Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that—

(1) such jurisdiction shall terminate at an earlier date to the extent provided under section 4164 (relating to mandatory release) or section 4211 (relating to early termination of parole supervision), and

(2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

(c) In the case of any parolee found to have intentionally refused or failed to respond to any reasonable request, order, summons, or warrant of the Commission or any member or agent thereof, the jurisdiction of the Commission may be extended for the period during which the parolee so refused or failed to respond.

(d) The parole of any parolee shall run concurrently with the period of parole or probation under any other Federal, State, or local sentence.

(e) The parole of any prisoner sentenced before June 29, 1932, shall be for the remainder of the term or terms specified in his sentence, less good time allowances provided by law.

(f) Upon the termination of the jurisdiction of the Commission over any parolee, the Commission shall issue a certificate of discharge to such parolee and to such other agencies as it may determine.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 226.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. A prior section 4210, added Pub.L. 87–845, § 4(a), Oct. 18, 1962, 76A Stat. 698, providing for authorization of Federal officers of penal or correctional institutions to execute a Canal Zone parole violation warrant and to hold the parolee for return to the Canal Zone, was repealed by section 2 of Pub.L. 94–233 as part of the general revision of this chapter by Pub.L. 94–233. See section 4217 of this title.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4211. Early termination of parole

(a) Upon its own motion or upon request of the parolee, the Commission may terminate supervision over a parolee prior to the termination of jurisdiction under section 4210.

(b) Two years after each parolee's release on parole, and at least annually thereafter, the Commission shall review the status of the parolee to determine the need for continued supervision. In calculating such two-year period there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.

(c)(1) Five years after each parolee's release on parole, the Commission shall terminate supervision over such parolee unless it is determined, after a hearing conducted in accordance with the procedures prescribed in section 4214(a)(2), that such supervision should not be terminated because there is a likelihood that the parolee will engage in conduct violating any criminal law.

(2) If supervision is not terminated under subparagraph (1) of this subsection the parolee may request a hearing annually thereafter, and a hearing, with procedures as provided in subparagraph (1) of this subsection shall be conducted with respect to such termination of supervision not less frequently than biennially.

(3) In calculating the five-year period referred to in subparagraph (1), there shall not be included any period of release on parole prior to the most recent such release, nor any period served in confinement on any other sentence.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 227.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4212. Aliens

When an alien prisoner subject to deportation becomes eligible for parole, the Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States.

Such prisoner when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 227.)

Repeal of Section

Pub.L. 98–473, Titled II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. Provisions similar to those comprising this section were contained in former section 4204 of this title, prior to the repeal of such section and the general revision of this chapter by Pub.L. 94–233.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4213. Summons to appear or warrant for retaking of parolee

(a) If any parolee is alleged to have violated his parole, the Commission may—

(1) summon such parolee to appear at a hearing conducted pursuant to section 4214; or

(2) issue a warrant and retake the parolee as provided in this section.

(b) Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be suspended pending disposition of the charge.

(c) Any summons or warrant issued pursuant to this section shall provide the parolee with written notice of—

(1) the conditions of parole he is alleged to have violated as provided under section 4209;

(2) his rights under this chapter; and

(3) the possible action which may be taken by the Commission.

(d) Any officer of any Federal penal or correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant issued under this section is delivered, shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner, or to the custody of the

Attorney General, if the Commission shall so direct.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 227.)

Repeal of Section

Pub.L. 98-473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. Provisions similar to those comprising this section were contained in former section 4205 of this title, prior to the repeal of such section and the general revision of this chapter by Pub.L. 94-233.

Savings Provisions of Pub.L. 98-473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4214. Revocation of parole

(a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have—

(A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:

(i) continuation of revocation proceedings is not warranted; or

(ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;

(iii) the parolee is not likely to fail to appear for further proceedings; and

(iv) the parolee does not constitute a danger to himself or others.

(B) upon a finding of probable cause under subparagraph (1)(A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection, the Commission may subpena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpena, the Commission may petition a court of the United States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

(3) Following the disposition review, the Commission may:

(A) let the detainer stand; or

(B) withdraw the detainer.

(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

(1) restore the parolee to supervision;

(2) reprimand the parolee;

(3) modify the parolee's conditions of the parole;

(4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or

(5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 228.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Amendment of Subsec. (b)(1)

Pub.L. 98–473, Title II, §§ 235, 238(f), Oct. 12, 1984, 98 Stat. 2031, 2039, provided that, effective Nov. 1, 1986, subsec. (b)(1) of this section is amended by adding after "parole" the following: "or a failure to pay a fine in default within thirty days after notification that it is in default".

See Codification note below.

Codification. Pub.L. 98–596, § 12(a)(6), Oct. 30, 1984, 98 Stat. 3139, restored the sentence which Pub.L. 98–473 had amended (see Amendment of Subsec. (b)(1) note above), effective Oct. 12, 1984, pursuant to section 12(b) of Pub.L. 98–596. This amendment was not executed to text since the identical language was presently in text. This amendment was a probable attempt to restore the text of subsec. (b)(1) of this section which was amended by Pub.L. 98–473, Title II, c. II, § 238(f), Oct. 12, 1984, 98 Stat. 2039, effective, however, on Nov. 1, 1986.

Prior Provisions. Provisions similar to those comprising this section were contained in former section 4207 of this title, prior to the repeal of such section and the general revision of this chapter by Pub.L. 94–233.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4215. Appeal

(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may appeal such decision by submitting a written application to the National Appeal Board not later than thirty days following the date on which the decision is rendered.

(b) The National Appeals Board, upon receipt of the appellant's papers, must act pursuant to rules and regulations within sixty days to reaffirm, modify, or reverse the decision and shall inform the appellant in writing of the decision and the reasons therefor.

(c) The National Appeals Board may review any decision of a regional commissioner upon the written request of the Attorney General filed not later

than thirty days following the decision and, by majority vote, shall reaffirm, modify, or reverse the decision within sixty days of the receipt of the Attorney General's request. The Board shall inform the Attorney General and the individual to whom the decision applies in writing of its decision and the reasons therefor.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 230, and amended Pub.L. 98–473, Title II, § 1408(c), Oct. 12, 1984, 98 Stat. 2178.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Effective Date of Amendment. Amendment of section effective 30 days after Oct. 12, 1984, pursuant to section 1409(a) of Pub.L. 98–473.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4216. Young adult offenders

In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C., chap. 402) sentence may be imposed pursuant to the provisions of such Act.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 230.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

References in Text. The Federal Youth Corrections Act, referred to in text, is Act Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086, as amended, which was classified generally to chapter 402 (section 5005 et seq.) of this title and was repealed by Pub.L. 98–473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027, effective Oct. 12, 1984, pursuant to section 235(a)(1)(A) of Pub.L. 98–473, set out as an Effective Date note under section 3551 of this title, with sections 5017 to 5020 thereof subject to remain in effect as provided in section 235(b) of Pub.L. 98–473, set out as a Savings Provision note under section 3551 of this title.

Prior Provisions. Provisions similar to those comprising this section were contained in former section 4209 of this title, prior to the repeal of such section and the general revision of this chapter by Pub.L. 94–233.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4217. Warrants to retake Canal Zone parole violators

An officer of a Federal penal or correctional institution, or a Federal officer authorized to serve criminal process within the United States, to whom a warrant issued by the Governor of the Canal Zone for the retaking of a parole violator is delivered, shall execute the warrant by taking the prisoner and holding him for delivery to a representative of the Governor of the Canal Zone for return to the Canal Zone.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 231.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Prior Provisions. Provisions similar to those comprising this section were contained in former section 4210 of this title, prior to the repeal of such section and the general revision of this chapter by Pub.L. 94–233.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4218. Applicability of Administrative Procedure Act

(a) For purposes of the provisions of chapter 5 of title 5, United States Code, other than sections 554, 555, 556, and 557, the Commission is an "agency" as defined in such chapter.

(b) For purposes of subsection (a) of this section, section 553(b)(3)(A) of title 5, United States Code, relating to rulemaking, shall be deemed not to include the phrase "general statements of policy".

(c) To the extent that actions of the Commission pursuant to section 4203(a)(1) are not in accord with the provisions of section 553 of title 5, United States Code, they shall be reviewable in accordance with the provisions of sections 701 through 706 of title 5, United States Code.

(d) Actions of the Commission pursuant to paragraphs (1), (2), and (3) of section 4203(b) shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5, United States Code.

(Added Pub.L. 94–233, § 2, Mar. 15, 1976, 90 Stat. 231.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(5), 235, Oct. 12, 1984, 98 Stat. 2027, 2031 provided that this section is repealed effective Nov. 1, 1986.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

CHAPTER 313—OFFENDERS WITH MENTAL DISEASE OR DEFECT

Sec.

4241. Determination of mental competency to stand trial.
4242. Determination of the existence of insanity at the time of the offense.
4243. Hospitalization of a person found not guilty only by reason of insanity.
4244. Hospitalization of a convicted person suffering from mental disease or defect.
4245. Hospitalization of a imprisoned person suffering from mental disease or defect.
4246. Hospitalization of a person due for release but suffering from mental disease or defect.
4247. General provisions for chapter.
[4248. Omitted.]

§ 4241. Determination of mental competency to stand trial

(a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be

admissible as evidence in a trial for the offense charged.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2057.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 876 (May 13, 1930, ch. 254, § 6, 46 Stat. 271).

Changes were made in phraseology and surplusage omitted.

Short Title of 1984 Amendment. Section 401 of Pub.L. 98–473, Title II, c. IV, Oct. 12, 1984, 98 Stat. 2057, provided: "This chapter [chapter IV of Title II of Pub.L. 98–473] may be sited [sic] as the 'Insanity Defense Reform Act of 1984'."

§ 4242. Determination of the existence of insanity at the time of the offense

(a) Motion for pretrial psychiatric or psychological examination.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(b) Special verdict.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the Government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find the defendant—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of insanity.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2059.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 877 (May 13, 1930, ch. 254, § 7, 46 Stat. 272).

Minor change was made in phraseology.

§ 4243. Hospitalization of a person found not guilty only by reason of insanity

(a) Determination of present mental condition of acquitted person.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (e).

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

(d) Burden of proof.—In a hearing pursuant to subsection (c) of this section, a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect. With respect to any other offense, the person has the burden of such proof by a preponderance of the evidence.

(e) Determination and disposition.—If, after the hearing, the court fails to find by the standard specified in subsection (d) of this section that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(f) Discharge.—When the director of the facility in which an acquitted person is hospitalized pursu-

ant to subsection (e) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by the standard specified in subsection (d) that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(g) Revocation of conditional discharge.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (f) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(As amended Pub.L. 98–473, Title II, § 403(a), Oct. 12, 1984, 98 Stat. 2059.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 878 (May 13, 1930, ch. 254, § 8, 46 Stat. 272).

Changes were made in translations and phraseology, and unnecessary words omitted.

§ 4244. Hospitalization of a convicted person suffering from mental disease or defect

(a) Motion to determine present mental condition of convicted defendant.—A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to the provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentenc-

ing alternatives that could best accord the defendant the kind of treatment he does need.

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

(e) Discharge.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2061.)

§ 4245. Hospitalization of an imprisoned person suffering from mental disease or defect

(a) Motion to determine present mental condition of imprisoned person.—If a person serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the Government, at the request of the director of the facility in which the person is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the person. The court shall grant the motion if there is reasonable cause to believe that the person may presently be suffering from a mental disease or defect or the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the transfer of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the person may be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General shall hospitalize the person for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier.

(e) Discharge.—When the director of the facility in which the person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the person has not expired, the court shall order that the person be reimprisoned until the expiration of his sentence of imprisonment.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2062.)

§ 4246. Hospitalization of a person due for release but suffering from mental disease or defect

(a) Institution of proceeding.—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are

not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume each responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

(e) Discharge.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court any any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) Revocation of conditional discharge.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and,

upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) Release to state of certain other persons.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 403(a), 98 Stat. 2062.)

§ 4247. General provisions for chapter

(a) Definitions.—As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs; and

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

(b) Psychiatric or psychological examination.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or , if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.—(1) The director of the facility in which a person is hospitalized pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, or 4246 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

(f) Videotape record.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired.—Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) Discharge.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General.—

The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

(Added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, and amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 403(a), 98 Stat. 2065.)

[§ 4248. Omitted.]

Codification

Section, added Sept. 7, 1949, c. 535, § 1, 63 Stat. 686, which related to the termination of custody by release or transfer, was omitted in the general amendment of this chapter by Pub.L. 98–473, Title II, c. IV, § 403(a), Oct. 12, 1984, 98 Stat. 2057.

CHAPTER 314—NARCOTIC ADDICTS

Sec.

4251. Definitions.
4252. Examination.

Sec.
4253. Commitment.
4254. Conditional release.
4255. Supervision in the community.

§ 4251. Definitions

As used in this chapter—

(a) "Addict" means any individual who habitually uses any narcotic drug as defined in section 102(16) of the Controlled Substances Act so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.

(b) "Crime of violence" includes voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or an attempt or conspiracy to commit any of the foregoing offenses.

(c) "Treatment" includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence, and his susceptibility to addiction.

(d) "Felony" includes any offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a felony by the law of the place where that offense was committed.

(e) "Conviction" and "convicted" mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, and do not include a final judgment which has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

(f) "Eligible offender" means any individual who is convicted of an offense against the United States, but does not include—

(1) an offender who is convicted of a crime of violence.

(2) an offender who is convicted of unlawfully importing or selling or conspiring to import or sell a narcotic drug, unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug.

(3) an offender against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided,* That an offender on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

(4) an offender who has been convicted of a felony on two or more prior occasions.

(5) an offender who has been committed under title I of the Narcotic Addict Rehabilitation Act of 1966, under this chapter, under the District of Columbia Code, or under any State proceeding because of narcotic addiction on three or more occasions.

(Added Pub.L. 89–793, Title II, § 201, Nov. 8, 1966, 80 Stat. 1442, and amended Pub.L. 91–513, Title III, § 1102(s), Oct. 27, 1970, 84 Stat. 1294; Pub.L. 92–420, § 3, Sept. 16, 1972, 86 Stat. 677.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(6), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

References in Text. Section 102(16) of the Controlled Substances Act, referred to in subsec. (a), is classified to section 802(16) of Title 21, U.S.C.A., Food and Drugs.

Title I of the Narcotic Addict Rehabilitation Act of 1966, referred to in subsec. (f)(5), is classified generally to section 2901 et seq. of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4252. Examination

If the court believes that an eligible offender is an addict, it may place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment. The Attorney General shall report to the court within thirty days; or any additional period granted by the court, the results of such examination and make any recommendations he deems desirable. An offender shall re-

ceive full credit toward the service of his sentence for any time spent in custody for an examination.

(Added Pub.L. 89–793, Title II, § 201, Nov. 8, 1966, 80 Stat. 1443.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(6), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4253. Commitment

(a) Following the examination provided for in section 4252, if the court determines that an eligible offender is an addict and is likely to be rehabilitated through treatment, it shall commit him to the custody of the Attorney General for treatment under this chapter, except that no offender shall be committed under this chapter if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable. Such commitment shall be for an indeterminate period of time not to exceed ten years, but in no event shall it exceed the maximum sentence that could otherwise have been imposed.

(b) If, following the examination provided for in section 4252, the court determines that an eligible offender is not an addict, or is an addict not likely to be rehabilitated through treatment, it shall impose such other sentence as may be authorized or required by law.

(Added Pub.L. 89–793, Title II, § 201, Nov. 8, 1966, 80 Stat. 1443.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(6), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4254. Conditional release

An offender committed under section 4253(a) may not be conditionally released until he has been treated for six months following such commitment in an institution maintained or approved by the Attorney General for treatment. The Attorney General may then or at any time thereafter report to the Board of Parole whether the offender should be conditionally released under supervision. After receipt of the Attorney General's report, and certification from the Surgeon General of the Public Health Service that the offender has made sufficient progress to warrant his conditional release under supervision, the Board may in its discretion order such a release. In determining suitability for release, the Board may make any investigation it deems necessary. If the Board does not conditionally release the offender, or if a conditional release is revoked, the Board may thereafter grant a release on receipt of a further report from the Attorney General.

(Added Pub.L. 89–793, Title II, § 201, Nov. 8, 1966, 80 Stat. 1443.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(6), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

Transfer of Functions. All functions of the Public Health Service, of the Surgeon General of the Public Health Service, and of all other officers and employees of the Public Health Service, and all functions of all agencies of or in the Public Health Service were transferred to the Secretary of Health, Education, and Welfare, now the Secretary of Health and Human Services.

§ 4255. Supervision in the community

An offender who has been conditionally released shall be under the jurisdiction of the United States Parole Commission as if on parole, pursuant to chapter 311 of this title.

The Director of the Administrative Office of the United States Courts may contract with any appropriate public or private agency or any person for supervisory aftercare of an offender. The Director may negotiate and award such contracts without regard to section 3709 of the Revised Statutes (41 U.S.C. 5).

(Added Pub.L. 89–793, Title II, § 201, Nov. 8, 1966, 80 Stat. 1443, and amended Pub.L. 95–537, § 3, Oct. 27, 1978, 92 Stat. 2038.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(6), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

CHAPTER 315—DISCHARGE AND RELEASE PAYMENTS

Sec.
4281. Discharge from prison.
4282. Arrested but unconvicted persons.
4283. Probation.
4284. Advances for rehabilitation.
4285. Persons released pending further judicial proceedings.

Amendment of Analysis

Pub.L. 98–473, Title II, §§ 218(f), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that, effective Nov. 1, 1986, the section analysis of this chapter is amended by amending the items relating to:

(1) section 4281 to read:

"4281. Repealed."; and

(2) sections 4283 and 4284 to read as follows:

"4283. Repealed.

"4284. Repealed.".

§ 4281. Discharge from prison

A person convicted under the laws of the United States shall, upon discharge from imprisonment, or release on parole, be furnished with transportation to the place of conviction or bona fide residence within the United States at the time of his commitment or to such place within the United States as may be authorized by the Attorney General.

He shall also be furnished with such suitable clothing as may be authorized by the Attorney General, and, in the discretion of the Attorney General, an amount of money not to exceed $100.

(As amended Sept. 19, 1962, Pub.L. 87–672, 76 Stat. 557.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(7), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., §§ 721, 746 (Mar. 3, 1891, ch. 529, § 6, 26 Stat. 840; June 25, 1910, ch. 387, § 8, 36 Stat. 820; July 3, 1926, ch. 795, 44 Stat. 901).

This section represents a consolidation of sections 721 and 746 of title 18, U.S.C., 1940 ed., with such changes of phraseology as were necessary to effect consolidation.

Such phrases as "on indictment", "under sentence of the court", "paroled prisoner" and "on the discharge from any prison" were omitted in the process of revision.

The amount of a prisoner's clothing allowance, fixed by said section 746, was increased from $20 to $30 to conform to recent appropriation acts and the $5 allowance to persons released on parole under said section 721 was increased to the same figure in the interest of fair and uniform administration.

The qualification that the term of imprisonment shall have been six months or more was omitted as artificial and not conducive to good administration.

These changes were made after consultation with the Director of the Bureau of Prisons.

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 4282. Arrested but unconvicted persons

On the release from custody of a person arrested on a charge of violating any law of the United States or of the Territory of Alaska, but not indicted nor informed against, or indicted or informed against but not convicted, and detained pursuant to chapter 207, or a person held as a material witness the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bona fide residence if such cost is not greater than to the place of arrest.

(As amended Oct. 12, 1984, Pub.L. 98–473, Title II, § 207, 98 Stat. 1986.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 746a (July 3, 1926, ch. 795, § 2, as added June 21, 1941, ch. 212, 55 Stat. 254).

The phrase "informed against" was inserted in two places in view of the fact that under the Federal Rules of Criminal Procedure the use of informations may be expected to increase. See Rule 7(b).

The section was extended to cover a person held as a material witness and unable to make bail. His predicament obviously calls for the relief afforded by the revised section.

Changes were made in phraseology and surplusage omitted.

§ 4283. Probation

A court of the United States when placing a defendant on probation, may direct the United States marshal to furnish the defendant with transportation to the place to which the defendant is required to proceed under the terms of his probation and, in addition, may also direct the marshal to furnish the defendant with an amount of money, not to exceed $30, for subsistence expense to his destination. In such event, such expenses shall be paid by the marshal.

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(7), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 746b (July 3, 1926, ch. 795, § 3, as added June 21, 1941, ch. 212, 55 Stat. 254).

The sum "$30" was substituted for $20 to conform to section 4281 of this title.

Minor changes were made in phraseology.

§ 4284. Advances for rehabilitation

(a) The Attorney General, under such regulations as he prescribes, acting for himself or through such officers and employees as he designates, may use so much of the trust funds designated as "Commissary Funds, Federal Prisons" in section 1321(a)(22) of title 31, as may be surplus to other needs of the trust, to provide advances to prisoners at the time of their release, as an aid to their rehabilitation.

(b) An advance made hereunder shall in no instance exceed $150 except with the specific approval of the Attorney General, and shall in every case be secured by the personal note of the prisoner conditioned to make repayment monthly when employed, or otherwise possessed of funds, with interest at a rate not to exceed 6 per centum per annum and subject to an agreement on the part of the prisoner that the funds so advanced shall be expended only for the purposes designated in the loan agreement. Repayments of principal and interest shall be credited to the trust fund from which the advance was made. Any unpaid principal or interest on said note shall be considered as a debt due the United States.

(Added May 15, 1952, c. 289, § 1, 66 Stat. 72, and amended Sept. 13, 1982, Pub.L. 97–258, § 3(e)(5), 96 Stat. 1064.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 218(a)(7), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

§ 4285. Persons released pending further judicial proceedings

Any judge or magistrate of the United States, when ordering a person released under chapter 207 on a condition of his subsequent appearance before that court, any division of that court, or any court of the United States in another judicial district in which criminal proceedings are pending, may, when the interests of justice would be served thereby and the United States judge or magistrate is satisfied, after appropriate inquiry, that the defendant is financially unable to provide the necessary transportation to appear before the required court on his own, direct the United States marshal to arrange for that person's means of noncustodial transportation or furnish the fare for such transportation to the place where his appearance is required, and in addition may direct the United States marshal to furnish that person with an amount of money for subsistence expenses to his destination, not to exced [1] the amount authorized as a per diem allowance for travel under section 5702(a) of title 5, United States Code. When so ordered, such expenses shall be paid by the marshal out of funds authorized by the Attorney General for such expenses.

(Added Pub.L. 95–503, § 1, Oct. 24, 1978, 92 Stat. 1704.)

[1] So in original. Probably should be "exceed".

CHAPTER 317—INSTITUTIONS FOR WOMEN

Sec.

4321. Board of Advisers.

§ 4321. Board of Advisers

Four citizens of the United States of prominence and distinction, appointed by the President to serve without compensation, for terms of four years, together with the Attorney General of the United States, the Director of the Bureau of Prisons and the warden of the Federal Reformatory for Women, shall constitute a Board of Advisers of said Federal Reformatory for Women, which shall recommend ways and means for the discipline and training of the inmates, to fit them for suitable employment upon their parole or discharge.

Any person chosen to fill a vacancy shall be appointed only for the unexpired term of the citizen whom he shall succeed.

Amendment of Section

Pub.L. 98–473, Title II, § 223(n), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, this section is amended by deleting "parole or".

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 816 (June 7, 1924, ch. 287, § 7, 43 Stat. 474; May 14, 1930, ch. 274, § 1, 46 Stat. 325).

The provisions relating to the appointment of the board in the first instance were omitted as executed.

"Warden" was substituted for "superintendent" and "Federal Reformatory for Women" for "United States Industrial Institution for Women" to conform to existing administrative usage.

Minor changes were made in translation, phraseology, and arrangement.

CHAPTER 319—NATIONAL INSTITUTE OF CORRECTIONS

Sec.

4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers.[1]
4352. Authority of Institute; report to President and Congress; time; records of recipients; access; scope of section.[1]
4353. Authorization of appropriations.[1]

[1] Section catchlines in analysis editorially supplied.

§ 4351. Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers [1]

(a) There is hereby established within the Bureau of Prisons a National Institute of Corrections.

(b) The overall policy and operations of the National Institute of Corrections shall be under the supervision of an Advisory Board. The Board shall consist of sixteen members. The following six individuals shall serve as members of the Commission ex officio: the Director of the Federal Bureau of Prisons or his designee, the Administrator of the Law Enforcement Assistance Administration or his designee, Chairman of the United States Parole Board or his designee, the Director of the Federal Judicial Center or his designee, the Associate Administrator for the Office of Juvenile Justice and Delinquency Prevention or his designee, and the Assistant Secretary for Human Development of the Department of Health, Education, and Welfare or his designee.

(c) The remaining ten members of the Board shall be selected as follows:

(1) Five shall be appointed initially by the Attorney General of the United States for staggered terms; one member shall serve for one year, one member for two years, and three members for three years. Upon the expiration of each member's term, the Attorney General shall appoint successors who will each serve for a term of three years. Each member selected shall be qualified as a practitioner (Federal, State, or local) in the field of corrections, probation, or parole.

(2) Five shall be appointed initially by the Attorney General of the United States for staggered terms, one member shall serve for one year, three members for two years, and one member for three years. Upon the expiration of each member's term the Attorney General shall appoint successors who will each serve for a term of three years. Each member selected shall be from the private sector, such as business, labor, and education, having demonstrated an active interest in corrections, probation, or parole.

(d) The members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States. Members of the Commission who are full-time officers or employees of the United States shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of the duties vested in the Board. Other members of the Board shall, while attending meetings of the Board or while engaged in duties related to such meetings or in other activities of the Commission pursuant to this title, be entitled to receive compensation at the rate not to exceed the daily equivalent of the rate authorized for GS–18 by section 5332 of title 5, United States Code, including traveltime, and while away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence equal to that authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(e) The Board shall elect a chairman from among its members who shall serve for a term of one year. The members of the Board shall also elect one or more members as a vice-chairman.

(f) The Board is authorized to appoint, without regard to the civil service laws, technical, or other advisory committees to advise the Institute with respect to the administration of this title as it deems appropriate. Members of these committees not otherwise employed by the United States, while engaged in advising the Institute or attending meetings of the committees, shall be entitled to receive compensation at the rate fixed by the Board but not to exceed the daily equivalent of the rate authorized for GS–18 by section 5332 of title 5, United States Code, and while away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence equal to that authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(g) The Board is authorized to delegate its powers under this title to such persons as it deems appropriate.

(h) The Institute shall be under the supervision of an officer to be known as the Director, who shall be appointed by the Attorney General after consultation with the Board. The Director shall have authority to supervise the organization, employees, enrollees, financial affairs, and all other operations of the Institute and may employ such staff, facul-

ty, and administrative personnel, subject to the civil service and classification laws, as are necessary to the functioning of the Institute. The Director shall have the power to acquire and hold real and personal property for the Institute and may receive gifts, donations, and trusts on behalf of the Institute. The Director shall also have the power to appoint such technical or other advisory councils comprised of consultants to guide and advise the Board. The Director is authorized to delegate his powers under this title to such persons as he deems appropriate.
(Added Pub.L. 93–415, Title V, § 521, Sept. 7, 1974, 88 Stat. 1139, and amended Pub.L. 95–115, § 8(a), Oct. 3, 1977, 91 Stat. 1060.)

[1] Section catchline editorially supplied.

Amendment of Subsec. (b)

Pub.L. 98–473, Title II, §§ 223(o), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, subsec. (b) of this section is amended by deleting "Parole Board" and substituting "Sentencing Commission".

Change of Name. The Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services and the Secretary, or any other official, of Health, Education, and Welfare was redesignated the Secretary or official, as appropriate, of Health and Human Services by Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, with any reference to the Department, Secretary or other official of Health, Education, and Welfare deemed to refer to the Department, Secretary or other official of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary or Department of Education pursuant to section 301 of Pub.L. 96–88. See sections 3441 and 3508 of Title 20, U.S.C.A., Education.

Membership of National Institute of Corrections. See section 235(b)(5) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2033, set out as a note under section 3551 of this title.

§ 4352. Authority of Institute; report to President and Congress; time; records of recipients; access; scope of section [1]

(a) In addition to the other powers, express and implied, the National Institute of Corrections shall have authority—

(1) to receive from or make grants to and enter into contracts with Federal, State, and general units of local government, public and private agencies, educational institutions, organizations, and individuals to carry out the purposes of this chapter;

(2) to serve as a clearinghouse and information center for the collection, preparation, and dissemination of information on corrections, including, but not limited to, programs for prevention of crime and recidivism, training of corrections personnel, and rehabilitation and treatment of criminal and juvenile offenders;

(3) to assist and serve in a consulting capacity to Federal, State, and local courts, departments, and agencies in the development, maintenance, and coordination of programs, facilities, and services, training, treatment, and rehabilitation with respect to criminal and juvenile offenders;

(4) to encourage and assist Federal, State, and local government programs and services, and programs and services of other public and private agencies, institutions, and organizations in their efforts to develop and implement improved corrections programs;

(5) to devise and conduct, in various geographical locations, seminars, workshops, and training programs for law enforcement officers, judges, and judicial personnel, probation and parole personnel, correctional personnel, welfare workers, and other persons, including lay ex-offenders, and paraprofessional personnel, connected with the treatment and rehabilitation of criminal and juvenile offenders;

(6) to develop technical training teams to aid in the development of seminars, workshops, and training programs within the several States and with the State and local agencies which work with prisoners, parolees, probationers, and other offenders;

(7) to conduct, encourage, and coordinate research relating to corrections, including the causes, prevention, diagnosis, and treatment of criminal offenders;

(8) to formulate and disseminate correctional policy, goals, standards, and recommendations for Federal, State, and local correctional agencies, organizations, institutions, and personnel;

(9) to conduct evaluation programs which study the effectiveness of new approaches, techniques, systems, programs, and devices employed to improve the corrections system;

(10) to receive from any Federal department or agency such statistics, data, program reports, and other material as the Institute deems necessary to carry out its functions. Each such department or agency is authorized to cooperate with the Institute and shall, to the maximum extent practicable, consult with and furnish information to the Institute;

(11) to arrange with and reimburse the heads of Federal departments and agencies for the use of personnel, facilities, or equipment of such departments and agencies;

(12) to confer with and avail itself of the assistance, services, records, and facilities of State

and local governments or other public or private agencies, organizations, or individuals;

(13) to enter into contracts with public or private agencies, organizations, or individuals, for the performance of any of the functions of the Institute; and

(14) to procure the services of experts and consultants in accordance with section 3109 of title 5 of the United States Code, at rates of compensation not to exceed the daily equivalent of the rate authorized for GS–18 by section 5332 of title 5 of the United States Code.

[(b) Repealed. Pub.L. 97–375, Title I, § 109(a), Dec. 21, 1982, 96 Stat. 1820.]

(c) Each recipient of assistance under this [2] shall keep such records as the Institute shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(d) The Institute, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for purposes of audit and examinations to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this chapter.

(e) The provision of this section shall apply to all recipients of assistance under this title, whether by direct grant or contract from the Institute or by subgrant or subcontract from primary grantees or contractors of the Institute.

(Added Pub.L. 93–415, Title V, § 521, Sept. 7, 1974, 88 Stat. 1140, and amended Pub.L. 97–375, Title I, § 109(a), Dec. 21, 1982, 96 Stat. 1820.)

[1] Section catchline editorially supplied.

[2] So in original. Probably should be "this title".

§ 4353. Authorization of appropriations [1]

There is hereby authorized to be appropriated such funds as may be required to carry out the purposes of this chapter.

(Added Pub.L. 93–415, Title V, § 521, Sept. 7, 1974, 88 Stat. 1141.)

[1] Section catchline editorially supplied.

PART IV—CORRECTION OF YOUTHFUL OFFENDERS

Chapter		Sec.
401.	General provisions	5001
402.	Repealed	
403.	Juvenile delinquency	5031

CHAPTER 401—GENERAL PROVISIONS

Sec.
5001. Surrender to State authorities; expenses.
5002. Advisory Corrections Council.
5003. Custody of State offenders.

§ 5001. Surrender to State authorities; expenses

Whenever any person under twenty-one years of age has been arrested, charged with the commission of an offense punishable in any court of the United States or of the District of Columbia, and, after investigation by the Department of Justice, it appears that such person has committed an offense or is a delinquent under the laws of any State or of the District of Columbia which can and will assume jurisdiction over such juvenile and will take him into custody and deal with him according to the laws of such State or of the District of Columbia, and that it will be to the best interest of the United States and of the juvenile offender, the United States attorney of the district in which such person has been arrested may forego his prosecution and surrender him as herein provided.

The United States marshal of such district upon written order of the United States attorney shall convey such person to such State or the District of Columbia, or, if already therein, to any other part thereof and deliver him into the custody of the proper authority thereof.

Before any person is conveyed from one State to another or from or to the District of Columbia under this section, he shall signify his willingness to be so returned, or there shall be presented to the United States attorney a demand from the executive authority of such State or the District of Columbia, to which the prisoner is to be returned, supported by indictment or affidavit as prescribed by section 3182 of this title.

The expense incident to the transportation of any such person, as herein authorized, shall be paid from the appropriation "Salaries, Fees, and Expenses, United States Marshals."

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 662a (June 11, 1932, ch. 243, 47 Stat. 301).

Language preceding "Whenever" was omitted as unnecessary, and "the District of Columbia" was inserted after "State".

Changes were made in phraseology and surplusage eliminated.

§ 5002. Advisory Corrections Council

There is hereby created an Advisory Corrections Council, composed of one United States circuit judge and two United States district judges designated from time to time by the Chief Justice of the United States, of one member, who shall be Chairman, designated by the Attorney General, and, ex officio, of the Chairman of the Board of Parole, the Chairman of the Youth Division, the Director of the Bureau of Prisons, and the Chief of Probation of the Administrative Office of the United States Courts. The Council shall hold stated meetings to consider problems of treatment and correction of all offenders against the United States and shall make such recommendations to the Congress, the President, the Judicial Conference of the United States, and other appropriate officials as may improve the administration of criminal justice and assure the coordination and integration of policies respecting the disposition, treatment, and correction of all persons convicted of offenses against the United States. It shall also consider measures to promote the prevention of crime and delinquency, suggest appropriate studies in this connection to be undertaken by agencies both public and private. The members of the Council shall serve without compensation but necessary travel and subsistence expenses as authorized by law shall be paid from available appropriations of the Department of Justice.

(Added Sept. 30, 1950, c. 1115, § 4, 64 Stat. 1090.)

Amendment of Section

Pub.L. 98–473, Title II, §§ 223(p), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, this section is amended by deleting "Board of Parole, the Chairman of the Youth Division," and substituting "United States Sentencing Commission,".

Membership of Advisory Corrections Council. See section 235(b)(5) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2033, set out as a note under section 3551 of this title.

§ 5003. Custody of State offenders

(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided,* That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

(b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.

(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

(d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

(Added May 9, 1952, c. 253, § 1, 66 Stat. 68, and amended Oct. 19, 1965, Pub.L. 89-267, § 1, 79 Stat. 990.)

[CHAPTER 402—REPEALED]

[§§ 5005, 5006. Repealed. Pub.L. 98-473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027]

Section 5005, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086, and amended Mar. 15, 1976, Pub.L. 94-233, § 3, 90 Stat. 231, related to the making of youth correction decisions by the United States Parole Commission.

Section 5006, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086, and amended May 15, 1976, Pub.L. 94-233, § 4, 90 Stat. 231, defined the terms used in this chapter.

Effective Date of Repeal. Section 235(a)(1)(A) of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, provided that the repeal of sections 5005 and 5006 shall take effect on Oct. 12, 1984.

[§§ 5007 to 5009. Repealed. Pub.L. 94-233, § 5, Mar. 15, 1976, 90 Stat. 231]

Section 5007, added Act Sept. 30, 1950, ch. 1115, § 2, 64 Stat. 1086, provided for meetings and duties of members of the Youth Correction Division.

Section 5008, added Act Sept. 30, 1950, ch. 1115, § 2, 64 Stat. 1086, provided for the appointment of officers and employees by the Attorney General.

Section 5009, added Act Sept. 30, 1950, ch. 1115, § 2, 64 Stat. 1086, provided for the adoption and promulgation of rules governing procedure by the Youth Correction Division.

[§§ 5010 to 5016. Repealed. Pub.L. 98-473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027]

Section 5010, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232, provided for the imposition of a suspended sentence or sentence to the custody of the Attorney General in the case of youthful offenders.

Section 5011, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, provided for the treatment of youthful offenders.

Section 5012, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, provided for the Director's certification of the availability of proper and adequate treatment facilities for youthful offenders.

Section 1513, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, authorized the Director of the Bureau of Prisons to contract for the maintenance of youthful offenders.

Section 5014, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, and amended July 17, 1970, Pub.L. 91-339, § 1, 84 Stat. 437; Mar. 15, 1976, Pub.L. 94-233, § 6, 90 Stat. 231, related to classification studies and reports.

Section 5015, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232, related to the power of the Director as to placement of youthful offenders.

Section 5016, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232, related to the periodic reports which the Director was required to make on all committed youthful offenders.

Effective Date of Repeal. Section 235(a)(1)(A) of Pub.L. 98-473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, provided that the repeal of sections 5010 to 5016 shall take effect on Oct. 12, 1984.

[§§ 5017 to 5020. Repealed. Pub.L. 98-473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027]

Sections 5017 to 5020 were repealed subject to remain in effect as provided in section 235(b) of Pub.L. 98-473 set out as a Savings Provision of Pub.L. 98-473 note under section 3551 of this title. Sections 5017 to 5020 read as follows:

§ 5017. Release of youth offenders

(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.

(b) The Commission may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Commission.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94–233, §§ 7, 9, 90 Stat. 232.)

§ 5018. Revocation of Commission orders

The Commission may revoke or modify any of its previous orders respecting a committed youth offender except an order of unconditional discharge.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Mar. 15, 1976, Pub.L. 94–233, § 9, 90 Stat. 232.)

§ 5019. Supervision of released youth offenders

Committed youth offenders permitted to remain at liberty under supervision or conditionally released shall be under the supervision of United States probation officers, supervisory agents appointed by the Attorney General, and voluntary supervisory agents approved by the Commission. The Commission is authorized to encourage the formation of voluntary organizations composed of members who will serve without compensation as voluntary supervisory agents and sponsors. The powers and duties of voluntary supervisory agents and sponsors shall be limited and defined by regulations adopted by the Commission.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Mar. 15, 1976, Pub.L. 94–233, § 9, 90 Stat. 232.)

§ 5020. Apprehension of released offenders

If, at any time before the unconditional discharge of a committed youth offender, the Commission is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility the Commission may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youthful offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given a revocation hearing by the Commission.

(Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended July 17, 1970, Pub.L. 91–339, § 2, 84 Stat. 437; Mar. 15, 1976, Pub.L. 94–233, § 8, 90 Stat. 232.)

Effective Date of Repeal. Section 235(a)(1)(A) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, provided that the repeal of sections 5017 to 5020 shall take effect on Oct. 12, 1984.

[§§ 5021 to 5026. Repealed. Pub.L. 98–473, Title II, § 218(a)(8), Oct. 12, 1984, 98 Stat. 2027]

Section 5021, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Oct. 3, 1961, Pub.L. 87–336, 75 Stat. 750; Mar. 15, 1976, Pub.L. 94–233, § 9, 90 Stat. 232, related to the issuance of certificates setting aside the convictions of youthful offenders.

Section 5022, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, provided that this chapter would not apply to offenses committed before its enactment.

Section 5023, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Apr. 8, 1952, c. 163, § 1, 66 Stat. 45, related to the relationship between this chapter and the Probation and Juvenile Delinquency Acts.

Section 5024, added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Apr. 8, 1952, c. 163, § 2, 66 Stat. 45; June 25, 1959, Pub.L. 86–70, § 17(a), 73 Stat. 144; July 12, 1960, Pub.L. 86–624, § 13(b), 74 Stat. 413; Dec. 27, 1967, Pub.L. 90–226, Title VIII, § 801(a), 81 Stat. 741, provided that this chapter was applicable to the States of the United States and to the District of Columbia.

Section 5025, added Apr. 8, 1952, c. 163, § 3(a), 66 Stat. 46, and amended Dec. 27, 1967, Pub.L. 90–226, Title VIII, § 801(b), 81 Stat. 741, related to the applicability of this chapter to the District of Columbia.

Section 5026, added Apr. 8, 1952, c. 163, § 3(a), 66 Stat. 46, provided that this chapter did not affect the parole of other offenders.

Effective Date of Repeal. Section 235(a)(1)(A) of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, provided that the repeal of sections 5021 to 5026 shall take effect on Oct. 12, 1984.

CHAPTER 403—JUVENILE DELINQUENCY

Sec.

5031. Definitions.
5032. Delinquency proceedings in district courts; transfer for criminal prosecution.
5033. Custody prior to appearance before magistrate.
5034. Duties of magistrate.
5035. Detention prior to disposition.
5036. Speedy trial.
5037. Dispositional hearing.
5038. Use of juvenile records.
5039. Commitment.
5040. Support.
5041. Parole.
5042. Revocation of parole or probation.

Amendment of Analysis

Pub.L. 98–473, Title II, §§ 214(d), 235, Oct. 12, 1984, 98 Stat. 2013, 2031, provided that, effective Nov. 1, 1986, the analysis of sections is amended by striking out the items relating to sections 5041 and 5042 and inserting in lieu thereof the following:

"5041. Repealed.

"5042. Revocation of Probation.".

§ 5031. Definitions

For the purposes of this chapter, a "juvenile" is a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday, and "juvenile delinquency" is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 501, 88 Stat. 1133.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 921 (June 16, 1938, ch. 486, § 1, 52 Stat. 764).

The phrase "who has not attained his eighteenth birthday" was substituted for "seventeen years of age or under" as more clearly reflecting congressional intent and administrative construction. The necessity of a definite fixing of the age of the juvenile was emphasized by Hon. Arthur J. Tuttle, United States district judge, Detroit, Mich., in a letter to the Committee on Revision of the Laws dated June 24, 1944. Words "an offense against the" was changed to "the violation of a" without change of substance.

Minor change was made in translation of section references to "this chapter".

Savings Provisions of Pub.L. 98–473, Title II, c. II. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 5032. Delinquency proceedings in district courts; transfer for criminal prosecution

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 841, 952(a), 955, or 959 of title 21, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State.

If an alleged juvenile delinquent is not surrendered to the authorities of a State or the District of Columbia pursuant to this section, any proceedings against him shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information, and no criminal prosecution shall be instituted for the alleged act of juvenile delinquency except as provided below.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice; however, a juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has an an element thereof the use, attempted use, or threatened use of physical force against the person of another, or that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense, or would be an offense described in section 32, 81, 844(d), (e), (f), (h), (i) or 2275 of this title, and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this subsection or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment ef-

forts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

Reasonable notice of the transfer hearing shall be given to the juvenile, his parents, guardian, or custodian and to his counsel. The juvenile shall be assisted by counsel during the transfer hearing, and at every other critical stage of the proceedings.

Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to a crime or an alleged act of juvenile delinquency subsequent criminal prosecution or juvenile proceedings based upon such alleged act of delinquency shall be barred.

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter.

Any proceedings against a juvenile under this chapter or as an adult shall not be commenced until any prior juvenile court records of such juvenile have been received by the court, or the clerk of the juvenile court has certified in writing that the juvenile has no prior record, or that the juvenile's record is unavailable and why it is unavailable.

Whenever a juvenile is adjudged delinquent pursuant to the provisions of this chapter, the specific acts which the juvenile has been found to have committed shall be described as part of the official record of the proceedings and part of the juvenile's official record.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 502, 88 Stat. 1134; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1201, 98 Stat. 2149.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 922 (June 16, 1938, ch. 486, § 2, 52 Stat. 765).

The final sentence of said section 922 of title 18, U.S.C., 1940 ed., was incorporated in section 5033 of this title.

Changes were made in arrangement and phraseology.

Codification. In the fourth paragraph, "that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21," was substituted for "punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death," instead of for "punishable by a maximum term of ten years imprisonment or more, life imprisonment or death," as directed by Pub.L. 98–473, Title II, § 1201(b)(1), Oct. 12, 1984, 98 Stat. 2150, as the probable intent of Congress.

§ 5033. Custody prior to appearance before magistrate

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 503, 88 Stat. 1135.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 922, 923 (June 16, 1938, ch. 486, §§ 2, 3, 52 Stat. 765).

This section consolidates said section 923, and the final sentence of said section 922, of title 18, U.S.C., 1940 ed., with such changes of phraseology as were necessary to effect the consolidation.

This revised section and section 5032 of this title were rewritten to make clear the legislative intent that a juvenile delinquency proceeding shall result in the adjudication of a status rather than the conviction of a crime.

The other provisions of said section 922 are incorporated in section 5032 of this title.

§ 5034. Duties of magistrate

The magistrate shall insure that the juvenile is represented by counsel before proceeding with critical stages of the proceedings. Counsel shall be assigned to represent a juvenile when the juvenile and his parents, guardian, or custodian are financially unable to obtain adequate representation. In cases where the juvenile and his parents, guardian, or custodian are financially able to obtain adequate representation but have not retained counsel, the magistrate may assign counsel and order the payment of reasonable attorney's fees or may direct the juvenile, his parents, guardian, or custodian to retain private counsel within a specified period of time.

The magistrate may appoint a guardian ad litem if a parent or guardian of the juvenile is not present, or if the magistrate has reason to believe that the parents or guardian will not cooperate with the juvenile in preparing for trial, or that the interests of the parents or guardian and those of the juvenile are adverse.

If the juvenile has not been discharged before his initial appearance before the magistrate, the magis-

trate shall release the juvenile to his parents, guardian, custodian, or other responsible party (including, but not limited to, the director of a shelter-care facility upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 504, 88 Stat. 1135.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 924 (June 16, 1938, ch. 486, §§ 4, 52 Stat. 765).

The words "foster homes" were inserted to remove any doubt as to the authority to commit to such foster homes in accordance with past and present administrative practice.

The reference to particular sections dealing with probation was omitted as unnecessary.

Changes were made in phraseology and arrangement.

§ 5035. Detention prior to disposition

A juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges. Insofar as possible, alleged delinquents shall be kept separate from adjudicated delinquents. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 505, 88 Stat. 1135.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 925 (June 16, 1938, ch. 486, § 5, 52 Stat. 765).

Minor changes were made in arrangement and phraseology

§ 5036. Speedy trial

If an alleged delinquent who is in detention pending trial is not brought to trial within thirty days from the date upon which such detention was begun, the information shall be dismissed on motion of the alleged delinquent or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted.

(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 506, 88 Stat. 1136.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 926 (June 16, 1938, ch. 486, § 6, 52 Stat. 766).

The words "foster homes" were inserted to remove any doubt as to the authority to commit to such foster homes in accordance with past and present administrative practice.

§ 5037. Dispositional hearing

(a) If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than twenty court days after trial unless the court has ordered further study in accordance with subsection (c). Copies of the presentence report shall be provided to the attorneys for both the juvenile and the Government a reasonable time in advance of the hearing.

(b) The court may suspend the adjudication of delinquency or the disposition of the delinquent on such conditions as it deems proper, place him on probation, or commit him to the custody of the Attorney General. Probation, commitment, or commitment in accordance with subsection (c) shall not extend beyond the juvenile's twenty-first birthday or the maximum term which could have been imposed on an adult convicted of the same offense, whichever is sooner, unless the juvenile has attained his nineteenth birthday at the time of disposition, in which case probation, commitment, or commitment in accordance with subsection (c) shall not exceed the lesser of two years or the maximum term which could have been imposed on an adult convicted of the same offense.

(c) If the court desires more detailed information concerning an alleged or adjudicated delinquent, it may commit him, after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. Such observation and study shall be conducted on an out patient basis, unless the court determines that inpatient observation and study are necessary to obtain the desired information. In the case of an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and his attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain his personal traits, his capabilities, his background, any previous delinquency or criminal experience, any mental or physical defect, and any other relevant factors. The Attorney General shall submit

to the court and the attorneys for the juvenile and the Government the results of the study within thirty days after the commitment of the juvenile, unless the court grants additional time.
(As amended Sept. 7, 1974, Pub.L. 93–415, Title V, § 507, 88 Stat. 1136.)

Amendment of Section

Pub.L. 98–473, Title II, §§ 214(a), 235, Oct. 12, 1984, 98 Stat. 2013, 2031, provided that, effective Nov. 1, 1986, this section is amended by redesignating subsection (c) as (d) and by striking out subsections (a) and (b) and inserting in lieu thereof the following:

"(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

"(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the lesser of—

"(A) three years; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3654, and 3565 are applicable to an order placing a juvenile on probation.

"(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old—

"(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

"(B) in any other case beyond the lesser of—

"(i) three years; or

"(ii) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult.".

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 927 (June 16, 1938, ch. 486, § 7, 52 Stat. 766).

Reference to section establishing the Board of Parole was omitted as unnecessary.

Minor changes were made in phraseology.

§ 5038. Use of juvenile records

(a) Throughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances:

(1) inquiries received from another court of law;

(2) inquiries from an agency preparing a presentence report for another court;

(3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency;

(4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court;

(5) inquiries from an agency considering the person for a position immediately and directly affecting the national security; and

(6) inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037.

Unless otherwise authorized by this section, information about the juvenile record may not be re-

leased when the request for information is related to an application for employment, license, bonding, or any civil right or privilege. Responses to such inquiries shall not be different from responses made about persons who have never been involved in a delinquency proceeding.

(b) District courts exercising jurisdiction over any juvenile shall inform the juvenile, and his parent or guardian, in writing in clear and nontechnical language, of rights relating to his juvenile record.

(c) During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records.

(d) Whenever a juvenile is found guilty of committing an act which if committed by an adult would be a felony that is a crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, such juvenile shall be fingerprinted and photographed. Except a juvenile described in subsection (f), fingerprints and photographs of a juvenile who is not prosecuted as an adult shall be made available only in accordance with the provisions of subsection (a) of this section. Fingerprints and photographs of a juvenile who is prosecuted as an adult shall be made available in the manner applicable to adult defendants.

(e) Unless a juvenile who is taken into custody is prosecuted as an adult neither the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.

(f) Whenever a juvenile has on two separate occasions been found guilty of committing an act which if committed by an adult would be a felony crime of violence or an offense described in section 841, 952(a), 955, or 959 of title 21, the court shall transmit to the Federal Bureau of Investigation, Identification Division, the information concerning the adjudications, including name, date of adjudication, court, offenses, and sentence, along with the notation that the matters were juvenile adjudications.

(Added Pub.L. 93–415, Title V, § 508, Sept. 7, 1974, 88 Stat. 1137, and amended Pub.L. 95–115, § 8(b), Oct. 3, 1977, 91 Stat. 1060; Pub.L. 98–473, Title II, § 1202, Oct. 12, 1984, 98 Stat. 2150.)

§ 5039. Commitment

No juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges.

Every juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment.

Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community.

(Added Pub.L. 93–415, Title V, § 509, Sept. 7, 1974, 88 Stat. 1138.)

§ 5040. Support

The Attorney General may contract with any public or private agency or individual and such community-based facilities as halfway houses and foster homes for the observation and study and the custody and care of juveniles in his custody. For these purposes, the Attorney General may promulgate such regulations as are necessary and may use the appropriation for "support of United States prisoners" or such other appropriations as he may designate.

(Added Pub.L. 93–415, Title V, § 510, Sept. 7, 1974, 88 Stat. 1138.)

§ 5041. Parole

A juvenile delinquent who has been committed may be released on parole at any time under such conditions and regulations as the United States Parole Commission deems proper in accordance with the provisions in section 4206 of this title.

(Added Pub.L. 93–415, Title V, § 511, Sept. 7, 1974, 88 Stat. 1138, and amended Pub.L. 94–233, § 11, Mar. 15, 1976, 90 Stat. 233.)

Repeal of Section

Pub.L. 98–473, Title II, §§ 214(b), 235, Oct. 12, 1984, 98 Stat. 2014, 2031, provided that this section is repealed effective Nov. 1, 1986.

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

§ 5042. Revocation of parole or probation

Any juvenile parolee or probationer shall be accorded notice and a hearing with counsel before his parole or probation can be revoked.

(Added Pub.L. 93–415, Title V, § 512, Sept. 7, 1974, 88 Stat. 1138.)

Amendment of Section

Pub.L. 98–473, Title II, §§ 214(c), 235, Oct. 12, 1984, 98 Stat. 2014, 2031, provided that, effective on Nov. 1, 1986, this section is amended by:

(1) striking out "parole or" each place it appears in the caption and text; and

(2) striking out "parolee or".

Savings Provisions of Pub.L. 98–473, Title II, c. II; Parole Release Dates. See section 235 of Pub.L. 98–473, Title II, c. II, Oct. 12, 1984, 98 Stat. 2031, set out as a note under section 3551 of this title.

PART V—IMMUNITY OF WITNESSES [1]

Sec.
6001. Definitions.
6002. Immunity generally.
6003. Court and grand jury proceedings.
6004. Certain administrative proceedings.
6005. Congressional proceedings.

1 So in original. Part V enacted without chapter designations.

§ 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, a United States bankruptcy court established under chapter 6, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Claims Court, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals.

(Added Pub.L. 91–452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 926, and amended Pub.L. 95–405, § 25, Sept. 30, 1978, 92 Stat. 877; Pub.L. 95–598, Title III, § 314(l), Nov. 6, 1978, 92 Stat. 2678; Pub.L. 96–417, Title VI, § 601(1), Oct. 10, 1980, 94 Stat. 1744; Pub. L. 97–164, Title I, § 164(1), Apr. 2, 1982, 96 Stat. 50.)

Termination of Civil Aeronautics Board and Transfer of Certain Functions. All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred effective in part Dec. 31, 1981, in part Jan. 1, 1983, and in part Jan. 1, 1985.

Abolition of Atomic Energy Commission. The Atomic Energy Commission was abolished and all functions transferred to the Administrator of the Energy Research and Development Administration. The Administration was subsequently terminated and all functions vested by law in the Administrator thereof were transferred to the Secretary of Energy, unless otherwise specifically provided.

Termination of Federal Power Commission. The Federal Power Commission was terminated and all functions transferred to the Secretary of Energy, except for certain functions transferred to the Federal Energy Regulatory Commission.

Termination of Subversive Activities Control Board. The Subversive Activities Control Board ceased to operate June 30, 1973.

§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

(Added Pub.L. 91–452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other informa-

tion at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub.L. 91–452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

§ 6004. Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub.L. 91–452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

§ 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

(Added Pub.L. 91–452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 928.)

*

18 APPENDIX I

MISCELLANEOUS PROVISIONS

Act June 25, 1948, c. 645, 62 Stat. 683, 859–862, as amended

Sections 2 to 21, inclusive

Sec. 2. Section 4611 of the Revised Statutes, as amended (46 U.S.C., section 712), is further amended to read as follows:

"Sec. 4611. Whenever any officer of a vessel of the United States, other than the master thereof, violates section 2191 of Title 18, the master shall, if he has actual knowledge of the offense or if complaint be made within three days after reaching port, surrender such officer to the proper authorities. Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages for such flogging or corporal punishment to the person illegally punished by such officer."

Sec. 3. The fourteenth paragraph of section 17 of the Act of August 1, 1914 (chapter 222, 38 Stat. 601; 25 U.S.C., section 86), is amended to read as follows:

"Land allotted to any applicant for enrollment as a citizen in the Five Civilized Tribes whether an Indian or freedman, shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under the laws of the United States: *Provided further*, That the interest accruing from tribal funds and deposited in banks in the State of Oklahoma may be used as authorized by the Act of March third, nineteen hundred and eleven, under the direction of the Secretary of the Interior, to defray the expense of per capita payments authorized by Congress."

Sec. 4. Subsection (f) of section 514 of the Act of February 16, 1938, chapter 30 (52 Stat. 77; 7 U.S.C., section 1514(f)), is amended to read as follows:

"(f) The provisions of section 3741 of the Revised Statutes, as amended (41 U.S.C., section 22), shall not apply to any crop insurance agreements made under this title."

Sec. 5. Section 510 of the Act approved July 1, 1944 (chapter 373, 58 Stat. 711; 42 U.S.C., section 228), is amended to read as follows:

"WEARING OF UNIFORMS

"Sec. 510. Except as may be authorized by regulations of the President, the insignia and uniform of commissioned officers of the Service, or any distinctive part of such insignia or uniform, or any insignia or uniform any part of which is similar to a distinctive part thereof, shall not be worn, after the promulgation of such regulations, by any person other than a commissioned officer of the Service."

Sec. 6. Section 1 of Title 1 of the United States Code is amended to read as follows:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise—

"words importing the singular include and apply to several persons, parties, or things;

"words importing the plural include the singular;

"words importing the masculine gender include the feminine as well;

"words used in the present tense include the future as well as the present;

"the words 'insane' and 'insane person' and 'lunatic' shall include every idiot, lunatic, insane person, and person non compos mentis;

"the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

" 'officer' includes any person authorized by law to perform the duties of the office;

" 'signature' or 'subscription' includes a mark when the person making the same intended it as such;

" 'oath' includes affirmation, and 'sworn' includes affirmed;

" 'writing' includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise." [As amended Oct. 31, 1951, c. 655, § 1, 65 Stat. 710]

Sec. 7. [Repealed. Act Aug. 31, 1954, c. 1158, 68 Stat. 1026]

Sec. 8. Section 2 of the Act approved January 24, 1905, chapter 137 (33 Stat. 614; 16 U.S.C., sec. 685, part), is amended to read as follows:

"Sec. 2. That when such areas have been designated as provided for in section one of this Act, hunting, trapping, killing, or capturing of game animals and birds upon the lands of the United States within the limits of said areas shall be unlawful, except under such regulations as may be prescribed from time to time, by the Secretary of the Interior."

Sec. 9. Section 2 of the Act approved June 29, 1906, chapter 3593 (34 Stat. 607; 16 U.S.C., sec. 685, part), is amended to read as follows:

"Sec. 2. That when such areas have been designated as provided in section one of this Act, hunting, trapping, killing, or capturing of game animals upon the lands of the United States within the limits of said areas shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture."

Sec. 10. The paragraph immediately preceding "Part A" of the Act approved August 11, 1916, ch. 313, 39 Stat. 446, entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes", said paragraph appearing as the first full paragraph on page 476 of said volume 39 of the United States Statutes at Large, and being section 683 of Title 16 of the United States Code, is amended to read as follows:

"That the President of the United States is hereby authorized to designate such areas on any lands which have been, or which may hereafter be, purchased by the United States under the provisions of the Act of March first, nineteen hundred and eleven (Thirty-six Statutes at Large, page nine hundred and sixty-one), entitled 'An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable streams', and Acts supplementary thereto and amendatory thereof, as should, in his opinion, be set aside for the protection of game animals, birds, or fish; and, except under such rules and regulations as the Secretary of Agriculture may from time to time prescribe, it shall be unlawful for any person to hunt, catch, trap, willfully disturb or kill any kind of game animal, game or nongame bird, or fish, or take the eggs of any such bird on any lands so set aside, or in or on the waters thereof."

Sec. 11. Section 2 of the Act approved June 5, 1920, chapter 247 (41 Stat. 986; 16 U.S.C., sec. 676, part), is amended to read as follows:

"Sec. 2. That when such areas have been designated as provided for in section 1 of this Act, hunting, trapping, killing, or capturing of game animals and birds upon the lands of the United States within the limits of said areas shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture."

Sec. 12. The Act approved February 28, 1925, chapter 376 (43 Stat. 1091; 16 U.S.C., sec. 682), as amended, is amended to read as follows:

"That the President of the United States is hereby authorized to designate such national forest lands within the Ozark National Forest, within the State of Arkansas, as should, in his discretion, be set aside for the protection of game animals, birds, or fish; and, except under such rules and regulations as the Secretary or Agriculture may from time to time prescribe, it shall be unlawful for any person to hunt, catch, trap, willfully disturb, or kill any kind of game animal, game or nongame bird, or fish, or take the eggs of any such bird on any lands so set aside, or in or on the waters thereof."

Sec. 13. [Repealed. Pub.L. 95–625, Title III, § 314(g), Nov. 10, 1978, 92 Stat. 3483.]

Sec. 14. Section 3 of the Act approved July 3, 1926, chapter 776 (44 Stat. 889; 16 U.S.C., sec. 689b), is amended to read as follows:

"Sec. 3. On lands within the game preserve established in section 2 of this Act, hunting, pursuing, poisoning, killing, or capturing by trapping, netting, or any other means, or attempting to hunt, pursue, kill, or capture any wild animals or birds for any purpose whatever upon the lands of the United States within the limits of said game preserve shall be unlawful except as hereinafter provided."

Sec. 15. Section 2 of the Act approved June 28, 1930, chapter 709 (46 Stat. 828; 16 U.S.C., sec. 692a), is amended to read as follows:

"Sec. 2. That when such game sanctuaries or refuges have been established as provided in section 1 hereof, the hunting, pursuing, poisoning, killing, or capturing by trapping, netting, or any other means, or attempting to hunt, pursue, kill, or capture any game animals or birds upon the lands of the United States within the limits of such game sanctuaries or refuges shall be unlawful except under such rules and regulations as the Secretary of Agriculture may from time to time prescribe."

Sec. 16. Section 2 of the Act approved March 10, 1934, chapter 54 (48 Stat. 400, 401; 16 U.S.C., sec. 694a), is amended to read as follows:

"Sec. 2. That when such fish and game sanctuaries or refuges have been established as provided in section 1 of this Act, hunting, pursuing, poisoning, angling for, killing, or capturing by trapping,

netting, or any other means, or attempting to hunt, pursue, angle for, kill, or capture any wild animals or fish for any purpose whatever upon the lands of the United States within the limits of said fish and game sanctuaries or refuges shall be unlawful except as hereinafter provided."

Sec. 17. The first sentence of section 8 (now codified in sections 156a and 171 of Title 46 U.S.C.) of the Act approved August 2, 1882, Chapter 374 (22 Stat. 189), is amended to read as follows:

"Horses, cattle, or other animals taken on board of or brought in any such vessel shall not be carried on any deck below the deck on which passengers are berthed, nor in any compartment in which passengers are berthed, nor in any adjoining compartment except in a vessel built of iron and of which the compartments are divided off by watertight bulkheads extending to the upper deck."

Sec. 18. If any part of Title 18, Crimes and Criminal Procedure as set out in section 1 of this Act, shall be held invalid the remainder shall not be affected thereby.

Sec. 19. No inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, in which any particular section is placed, nor by reason of the catchlines used in such title.

Sec. 20. This Act shall take effect September 1, 1948.

Sec. 21. The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule * are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.

* For schedule see the volume of U.S.C.A. covering the end of Title 18, Crimes and Criminal Procedure.

*

18 APPENDIX II
UNLAWFUL POSSESSION OR RECEIPT OF FIREARMS

Pub.L. 90–351, Title VII, §§ 1201 to 1203, June 19, 1968, 82 Stat. 236, as amended

Sec.

1201. Congressional findings and declaration.
1202. Receipt, possession, or transportation of firearms.
(a) Persons liable; penalties for violations.
(b) Employment; persons liable; penalties for violations.
(c) Definitions.
1203. Exemptions.

§ 1201. Congressional findings and declaration

The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

(As amended Pub.L. 90–618, Title III, § 301(a)(1), Oct. 22, 1968, 82 Stat. 1236.)

Short Title of 1984 Amendment. Section 1301 of Pub.L. 98–473, Title II, c. XVIII, Oct. 12, 1984, 98 Stat. 2185, provided: "This chapter [chapter XVIII of Title II of Pub.L. 98–473] may be cited as the 'Armed Career Criminal Act of 1984'."

§ 1202. Receipt, possession, or transportation of firearms

Persons liable; penalties for violations

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both. In the case of a person who receives, possesses, or transports in commerce or affecting commerce any firearm and who has three previous convictions by any court referred to in paragraph (1) of this subsection for robbery or burglary, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under this subsection, and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

Employment; persons liable; penalties for violations

(b) Any individual who to his knowledge and while being employed by any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who, in the course of such employment, receives, possesses, or transports in commerce or affecting commerce, after the date of the enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Definitions

(c) As used in this title—

(1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country;

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

(3) "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun;

(4) "destructive device" means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device; and includes any type of weapon which will or is designed to or may readily be converted to expel a projectile by the action of any explosive and having any barrel with a bore of one-half inch or more in diameter;

(5) "handgun" means any pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or capable of firing fixed cartridge ammunition, or any other firearm originally designed to be fired by the use of a single hand;

(6) "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger;

(7) "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger;

(8) "robbery" means any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury; and

(9) "burglary" means any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense.

(As amended Pub.L. 90–618, Title III, § 301(a)(2), (b), Oct. 22, 1968, 82 Stat. 1236; Pub.L. 98–473, Title II, §§ 1802, 1803, Oct. 12, 1984, 98 Stat. 2185.)

References in Text. Date of enactment of this Act, referred to in subsecs. (a) and (b), is June 19, 1968.

This title, referred to in subsec. (c), means Title VII of Pub.L. 90–351.

Short Title of 1984 Amendment. Section 1801 of Pub.L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 2185, provided: "This chapter [chapter XVIII of Title II of Pub.L. 98–473] may be cited as the 'Armed Career Criminal Act of 1984'."

§ 1203. Exemptions

This title shall not apply to—

(1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and

(2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

References in Text. This title, referred to in text, means Title VII of Pub.L. 90–351.

18 APPENDIX III
INTERSTATE AGREEMENT ON DETAINERS

Pub.L. 91–538, §§ 1 to 8, Dec. 9, 1970, 84 Stat. 1397–1403

Sec.

1. Short title.
2. Enactment into law of Interstate Agreement on Detainers.
3. Definition of term "Governor" for purposes of United States and District of Columbia.
4. Definition of term "appropriate court".
5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia.
6. Regulations, forms, and instructions.
7. Reservation of right to alter, amend, or repeal.
8. Effective date.

[§ 1. Short title]

That this Act may be cited as the "Interstate Agreement on Detainers Act".

Complementary Laws:

Ala.—Code 1975, § 15–9–81.
Alaska—AS 33.35.010 to 33.35.040.
Ariz.—A.R.S. §§ 31–481, 31–482.
Ark.—Ark.Stats. §§ 43–3201 to 43–3208.
Cal.—West's Ann.Cal.Penal Code, §§ 1389–1389.8.
Colo.—C.R.S. 24–60–501 to 24–60–507.
Conn.—C.G.S.A. 54–186 to 54–192.
Del.—11 Del.C. §§ 2540 to 2550.
D.C.—D.C. Code 1981, §§ 24–701 to 24–705.
Fla.—West's F.S.A. §§ 941.45 to 941.50.
Ga.—O.C.G.A. §§ 42–6–20 to 42–6–25.
Hawaii—HRS 834–1 to 834–6.
Idaho—I.C. §§ 19–5001 to 19–5008.
Ill.—S.H.A. ch. 38, ¶ 1003–8–9.
Ind.—West's A.I.C. 35–33–10–4.
Iowa—I.C.A. §§ 821.1 to 821.8.
Kansas—K.S.A. 22–4401 to 22–4408.
Ky.—KRS 440.450 to 440.510.
Me.—34–A M.R.S.A. §§ 9601 to 9609.
Md.—Code 1957, art. 27, §§ 616A–616S.
Mass.—M.G.L.A. c. 276 App., §§ 1–1 to 1–8.
Mich.—M.C.L.A. §§ 780.601 to 780.608.
Minn.—M.S.A. § 629.294.
Mo.—V.A.M.S. §§ 217.490 to 217.520.
Mont.—MCA 46–31–101 to 46–31–204.
Neb.—R.R.S.1943, §§ 29–759 to 29–765.
Nev.—N.R.S. 178.620 to 178.640.
N.H.—R.S.A. 606–A:1 to 606–A:6.
N.J.—N.J.S.A. 2A:159A–1 to 2A:159A–15.
N.M.—NMSA 1978, § 31–5–12.
N.Y.—McKinney's CPL § 580.20.
N.C.—G.S. §§ 15A–761 to 15A–767.
N.D.—NDCC 29–34–01 to 29–34–08.
Ohio—R.C. §§ 2963.30 to 2963.35.
Okl.—22 Okl.St.Ann. §§ 1345 to 1349.
Ore.—ORS 135.775 to 135.793.
Pa.—42 Pa.C.S.A. §§ 9101 to 9108.
R.I.—Gen.Laws 1956, §§ 13–13–1 to 13–13–8.
S.C.—Code 1976, §§ 17–11–10 to 17–11–80.
S.D.—SDCL 23–24A–1 to 23–24A–34.
Tenn.—T.C.A. §§ 40–31–101 to 40–31–108.
Tex.—Vernon's Ann.Texas C.C.P. art. 51.14.
U.S.—18 U.S.C.A.App.
Utah—U.C.A.1953, 77–29–5 to 77–29–11.
Vt.—28 V.S.A. §§ 1501 to 1509, 1531 to 1537.
Va.—Code 1950, §§ 53.1–210 to 53.1–215.
Wash.—West's RCWA 9.100.010 to 9.100.080.
W.Va.—Code, 62–14–1 to 62–14–7.
Wis.—W.S.A. 976.05, 976.06.
Wyo.—W.S.1977, §§ 7–15–101 to 7–15–107.

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory

or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jur-

isdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice

of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"Article VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"Article IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

Transfer of Functions. "Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub.L. 93-198. The Office of Commissioner of the District of Columbia was abolished as of noon Jan. 2, 1975 and replaced by the Office of Mayor of the District of Columbia.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one

another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

Transfer of Functions. "Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub.L. 93–198. The Office of Commissioner of the District of Columbia was abolished as of noon Jan. 2, 1975 and replaced by the Office of Mayor of the District of Columbia.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective date

This Act shall take effect on the ninetieth day after the date of its enactment.

References in Text. The date of its enactment, referred to in text, means Dec. 9, 1970.

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18 APPENDIX IV
CLASSIFIED INFORMATION PROCEDURES ACT

Pub.L. 96–456, Oct. 15, 1980, 94 Stat. 2025

Sec.

1. Definitions.
2. Pretrial conference.
3. Protective orders.
4. Discovery of classified information by defendants.
5. Notice of defendant's intention to disclose classified information.
6. Procedure for cases involving classified information.
7. Interlocutory appeal.
8. Introduction of classified information.
9. Security procedures.
10. Identification of information related to national defense.
11. Amendments to Act.
12. Attorney General guidelines.
13. Reports to Congress.
14. Functions of Attorney General exercised by Deputy Attorney General or designated Assistant Attorney General.
15. Effective date.
16. Short title.

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954.

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

References in Text. Paragraph r. of section 11 of the Atomic Energy Act of 1954, referred to in subsec. (a), is classified to section 2014(y) of Title 42, U.S.C.A, The Public Health and Welfare.

§ 2. Pretrial conference

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

§ 4. Discovery of classified information by defendants

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

References in Text. The Federal Rules of Criminal Procedure, referred to in text, are set out in this pamphlet.

§ 5. Notice of defendant's intention to disclose classified information

(a) Notice by defendant.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the

United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply.—If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

§ 6. Procedure for cases involving classified information

(a) Motion for hearing.—Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.—(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a) of this section, the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information.—(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings.—If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsidera-

tion of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure.—(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) of this section and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity.—Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

§ 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

§ 8. Introduction of classified information

(a) Classification status.—Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) Precautions by court.—The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(c) Taking of testimony.—During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

§ 9. Security procedures

(a) Within one hundred and twenty days of October 15, 1980, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) of this section first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

Security Procedures Established Pursuant to Pub.L. 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information

1. *Purpose.* The purpose of these procedures is to meet the requirements of Section 9(a) of the Classified Information Procedures Act of 1980, Pub.L. 96–456, 94 Stat. 2025, which in pertinent part provides that:

". . . [T]he Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court . ."

These procedures apply in all proceedings in criminal cases involving classified information, and appeals therefrom, before the United States district courts, the courts of appeal and the Supreme Court.

2. *Court Security Officer.* In any proceeding in a criminal case or appeal therefrom in which classified information is within, or reasonably expected to be within, the custody of the court, the court shall designate a court security officer. The Attorney General or the Department of Justice Security Officer, with the concurrence of the head of the agency or agencies from which the classified information originates, or their representatives, shall recommend to the court persons qualified to serve as court security officer.

The court security officer shall be selected from among those persons so recommended.

The court security officer shall be an individual with demonstrated competence in security matters, and shall, prior to designation, have been certified to the court in writing by the Department of Justice Security Officer as cleared for the level and category of classified information that will be involved. The court security officer may be an employee of the Executive Branch of the Government detailed to the court for this purpose. One or more alternate court security officers, who have been recommended and cleared in the manner specified above, may be designated by the court as required.

The court security officer shall be responsible to the court for document, physical, personnel and communications security, and shall take measures reasonably necessary to fulfill these responsibilities. The court security officer shall notify the court and the Department of Justice Security Officer of any actual, attempted, or potential violation of security procedures.

3. *Secure Quarters.* Any *in camera* proceeding—including a pretrial conference, motion hearing, or appellate hearing—concerning the use, relevance, or admissibility of classified information, shall be held in secure quarters recommended by the court security officer and approved by the court.

The secure quarters shall be located within the Federal courthouse, unless it is determined that none of the quarters available in the courthouse meets, or can reasonably be made equivalent to, security requirements of the Executive Branch applicable to the level and category of classified information involved. In that event, the court shall designate the facilities of another United States Government agency, recommended by the court security officer, which is located within the vicinity of the courthouse, as the site of the proceedings.

The court security officer shall make necessary arrangements to ensure that the applicable Executive Branch standards are met and shall conduct or arrange for such inspection of the quarters as may be necessary. The court security officer shall, in consultation with the United States Marshal, arrange for the installation of security devices and take such other measures as may be necessary to protect against any unauthorized access to classified information. All of the aforementioned activity shall be conducted in a manner which does not interfere with the orderly proceedings of the court. Prior to any hearing or other proceeding, the court security officer shall certify in writing to the court that the quarters are secure.

4. *Personnel Security—Court Personnel.* No person appointed by the court or designated for service therein shall be given access to any classified information in the custody of the court, unless such person has received a security clearance as provided herein and unless access to such information is necessary for the performance of an official function. A security clearance for justices and judges is not required, but such clearance shall be provided upon the request of any judicial officer who desires to be cleared.

The court shall inform the court security officer or the attorney for the government of the names of court personnel who may require access to classified information. That person shall then notify the Department of Justice Security Officer, who shall promptly make arrangements to obtain any necessary security clearances and shall approve such clearances under standards of the Executive Branch applicable to the level and category of classified information involved. The Department of Justice Security Officer shall advise the court in writing when the necessary security clearances have been obtained.

If security clearances cannot be obtained promptly, personnel in the Executive Branch having the necessary

clearances may be temporarily assigned to assist the court. If a proceeding is required to be recorded and an official court reporter having the necessary security clearance is unavailable, the court may request the court security officer or the attorney for the government to have a cleared reporter from the Executive Branch designated to act as reporter in the proceedings. The reporter so designated shall take the oath of office as prescribed by 28 U.S.C. § 753(a).

Justices, judges and cleared court personnel shall not disclose classified information to anyone who does not have a security clearance and who does not require the information in the discharge of an official function. However, nothing contained in these procedures shall preclude a judge from discharging his official duties, including giving appropriate instructions to the jury.

Any problem of security involving court personnel or persons acting for the court shall be referred to the court for appropriate action.

5. *Persons Acting for the Defendant.* The government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act.

6. *Jury.* Nothing contained in these procedures shall be construed to require an investigation or security clearance of the members of the jury or interfere with the functions of a jury, including access to classified information introduced as evidence in the trial of a case.

After a verdict has been rendered by a jury, the trial judge should consider a government request for a cautionary instruction to jurors regarding the release or disclosure of classified information contained in documents they have reviewed during the trial.

7. *Custody and Storage of Classified Materials.*

a. *Materials Covered.* These security procedures apply to all papers, documents, motions, pleadings, briefs, notes, records of statements involving classified information, notes relating to classified information taken during *in camera* proceedings, orders, affidavits, transcripts, untranscribed notes of a court reporter, magnetic recordings, or any other submissions or records which contain classified information as the term is defined in Section 1(a) of the Act, and which are in the custody of the court. This includes, but is not limited to (1) any motion made in connection with a pretrial conference held pursuant to Section 2 of the Act, (2) written statements submitted by the United States pursuant to Section 4 of the Act, (3) any written statement or written notice submitted to the court by the defendant pursuant to Section 5(a) of the Act, (4) any petition or written motion made pursuant to Section 6 of the Act, (5) any description of, or reference to, classified information contained in papers filed in an appeal, pursuant to Section 7 of the Act and (6) any written statement provided by the United States or by the defendant pursuant to Section 8(c) of the Act.

b. *Safekeeping.* Classified information submitted to the court shall be placed in the custody of the court security officer who shall be responsible for its safekeeping. When not in use, the court security officer shall store all classified materials in a safe or safe-type steel file container with built-in, dial-type, three position, changeable combinations which conform to the General Services Administration standards for security containers. Classified information shall be segregated from other information unrelated to the case at hand by securing it in a separate security container. If the court does not possess a storage container which meets the required standards, the necessary storage container or containers are to be supplied to the court on a temporary basis by the appropriate Executive Branch agency as determined by the Department of Justice Security Officer. Only the court security officer and alternate court security officer(s) shall have access to the combination and the contents of the container unless the court, after consultation with the security officer, determines that a cleared person other than the court security officer may also have access.

For other than temporary storage (*e.g.*, brief court recess), the court security officer shall insure that the storage area in which these containers shall be located meets Executive Branch standards applicable to the level and category of classified information involved. The secure storage area may be located within either the Federal courthouse or the facilities of another United States Government agency.

(c) *Transmittal of Classified Information.* During the pendency of a trial or appeal, classified materials stored in the facilities of another United States Government agency shall be transmitted in the manner prescribed by the Executive Branch security regulations applicable to the level and category of classified information involved. A trust receipt shall accompany all classified materials transmitted and shall be signed by the recipient and returned to the court security officer.

8. *Operating Routine.*

a. *Access to Court Records.* Court personnel shall have access to court records only as authorized. Access to classified information by court personnel shall be limited to the minimum number of cleared persons necessary for operating purposes. Access includes presence at an *in camera* hearing or any other proceeding during which classified information may be disclosed. Arrangements for access to classified information in the custody of the court by court personnel and persons acting for the defense shall be approved in advance by the court, which may issue a protective order concerning such access.

Except as otherwise authorized by a protective order, persons acting for the defendant will not be given custody of classified information provided by the government. They may, at the discretion of the court, be afforded access to classified information provided by the government in secure quarters which have been approved in accordance with § 3 of these procedures, but such classified information shall remain in the control of the court security officer.

b. *Telephone Security.* Classified information shall not be discussed over standard commercial telephone instruments or office intercommunication systems.

c. *Disposal of Classified Material.* The court security officer shall be responsible for the secure disposal of all classified materials which are not otherwise required to be retained.

9. *Records Security.*

a. *Classification Markings.* The court security officer, after consultation with the attorney for the government, shall be responsible for the marking of all court documents containing classified information with the appropriate level of classification and for indicating thereon any special access controls that also appear on the face of the document from which the classified information was obtained or that are otherwise applicable.

Every document filed by the defendant in the case shall be filed under seal and promptly turned over to the court security officer. The court security officer shall promptly examine the document and, in consultation with the attorney for the government or representative of the appropriate agency, determine whether it contains classified information. If it is determined that the document does contain classified information, the court security officer shall ensure that it is marked with the appropriate classification marking. If it is determined that the document does not contain classified information, it shall be unsealed and placed in the public record. Upon the request of the government, the court may direct that any document containing classified information shall thereafter be protected in accordance with § 7 of these procedures.

b. *Accountability System.* The court security officer shall be responsible for the establishment and maintenance of a control and accountability system for all classified information received by or transmitted from the court.

10. *Transmittal of the Record on Appeal.* The record on appeal, or any portion thereof, which contains classified information shall be transmitted to the court of appeals or to the Supreme Court in the manner specified in § 7(c) of these procedures.

11. *Final Disposition.* Within a reasonable time after all proceedings in the case have been concluded, including appeals, the court shall release to the court security officer all materials containing classified information. The court security officer shall then transmit them to the Department of Justice Security Officer who shall consult with the originating agency to determine the appropriate disposition of such materials. Upon the motion of the government, the court may order the return of the classified documents and materials to the department or agency which originated them. The materials shall be transmitted in the manner specified in § 7(c) of these procedures and shall be accompanied by the appropriate accountability records required by § 9(b) of these procedures.

12. *Expenses.* Expenses of the United States Government which arise in connection with the implementation of these procedures shall be borne by the Department of Justice or other appropriate Executive Branch agency.

13. *Interpretation.* Any question concerning the interpretation of any security requirement contained in these procedures shall be resolved by the court in consultation with the Department of Justice Security Officer and the appropriate Executive Branch agency security officer.

14. *Term.* These procedures shall remain in effect until modified in writing by The Chief Justice after consultation with the Attorney General of the United States, the Director of Central Intelligence, and the Secretary of Defense.

15. *Effective Date.* These procedures shall become effective forty-five days after the date of submission to the appropriate Congressional Committees, as required by the Act.

Issued this 12th day of February, 1981, after taking into account the views of the Attorney General of the United States, the Director of Central Intelligence, and the Secretary of Defense, as required by law.

WARREN E. BURGER
Chief Justice of the United States

§ 10. Identification of information related to national defense

In any prosecution in which the United States must establish that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

§ 11. Amendments to Act

Sections 1 through 10 of this Act may be amended as provided in section 2076, Title 28.

§ 12. Attorney General guidelines

(a) Within one hundred and eighty days of October 15, 1980, the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed. Such guidelines shall be transmitted to the appropriate committees of Congress.

(b) When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a) of this section, an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—

(1) the intelligence information which the Department of Justice officials believe might be disclosed,

(2) the purpose for which the information might be disclosed,

(3) the probability that the information would be disclosed, and

(4) the possible consequences such disclosure would have on the national security.

§ 13. Reports to Congress

(a) Consistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall report orally or in writing semiannually to the Permanent Select Committee on Intelligence of the United States House of Representatives, the Select Committee on Intelligence of the United States Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of Representatives on all cases where a decision not to prosecute a violation of Federal law pursuant to section 12(a) has been made.

(b) The Attorney General shall deliver to the appropriate committees of Congress a report concerning the operation and effectiveness of this Act and including suggested amendments to this Act. For the first three years this Act is in effect, there shall be a report each year. After three years, such reports shall be delivered as necessary.

References in Text. The first three years this Act is in effect, referred to in subsec. (b), are the first three years after Oct. 15, 1980, the effective date of this Act. See section 15 of this Act set out below.

§ 14. Functions of Attorney General exercised by Deputy Attorney General or designated Assistant Attorney General

The functions and duties of the Attorney General under this Act may be exercised by the Deputy Attorney General or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

§ 15. Effective date

The provisions of this Act shall become effective upon October 15, 1980, but shall not apply to any prosecution in which an indictment or information was filed before such date.

§ 16. Short title

That this Act may be cited as the "Classified Information Procedures Act".

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18 APPENDIX V
TREATIES OF EXTRADITION

The United States has entered into the following bilateral treaties of extradition with the following countries:

Country	Date signed	Entered into force	Citation
Albania	Mar. 1, 1933	Nov. 14, 1935	49 Stat. 3313.
Antigua and Barbuda	June 8, 1972	Jan. 21, 1977	28 UST 227.
Argentina	Jan. 21, 1972	Sept. 15, 1972	23 UST 3501.
Australia	May 14, 1974	May 8, 1976	27 UST 957.
Austria	Jan. 31, 1930	Sept. 11, 1930	46 Stat. 2779.
	May 19, 1934	Sept. 5, 1934	49 Stat. 2710.
Bahamas	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Aug. 17, 1978	30 UST 187.
Barbados	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Belgium	Oct. 26, 1901	July 14, 1902	32 Stat. 1894.
	June 20, 1935	Nov. 7, 1935	49 Stat. 3276.
	Nov. 14, 1963	Dec. 25, 1964	15 UST 2252.
Belize	June 8, 1972	Jan. 21, 1977	28 UST 227.
Bolivia	Apr. 21, 1900	Jan. 22, 1902	32 Stat. 1857.
Brazil	Jan. 13, 1961	Dec. 17, 1964	15 UST 2093.
	June 18, 1962	Dec. 17, 1964	15 UST 2112.
Bulgaria	Mar. 19, 1924	June 24, 1924	43 Stat. 1886.
	June 8, 1934	Aug. 15, 1935	49 Stat. 3250.
Burma	Dec. 22, 1931	Nov. 1, 1941	47 Stat. 2122.
Canada	Dec. 3, 1971	Mar. 22, 1976	27 UST 983.
	June 28, July 9, 1974.	Mar. 22, 1976	27 UST 1017.
Chile	Apr. 17, 1900	June 26, 1902	32 Stat. 1850.
Colombia	Sept. 14, 1979	Mar. 4, 1982	
Congo	Jan. 6, 1909	July 27, 1911	37 Stat. 1526.
	Jan. 15, 1929	May 19, 1929	46 Stat. 2276.
	Apr. 23, 1936	Sept. 24, 1936	50 Stat. 1117.
		Aug. 5, 1961	13 UST 2065.
Costa Rica	Nov. 10, 1922	Apr. 27, 1923	43 Stat. 1621.
Cuba	Apr. 6, 1904	Mar. 2, 1905	33 Stat. 2265.
	Dec. 6, 1904	Mar. 2, 1905	33 Stat. 2273.
	Jan. 14, 1926	June 18, 1926	44 Stat. 2392.
Cyprus	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Czechoslovakia	July 2, 1925	Mar. 29, 1926	44 Stat. 2367.
	Apr. 29, 1935	Aug. 28, 1935	49 Stat. 3253.
Denmark	June 22, 1972	July 31, 1974	25 UST 1293.
Dominica	June 8, 1972	Jan. 21, 1977	28 UST 227.
Dominican Republic	June 19, 1909	Aug. 2, 1910	36 Stat. 2468.
Ecuador	June 28, 1872	Nov. 12, 1873	18 Stat. 199.
	Sept. 22, 1939	May 29, 1941	55 Stat. 1196.
Egypt	Aug. 11, 1874	Apr. 22, 1875	19 Stat. 572.
El Salvador	Apr. 18, 1911	July 10, 1911	37 Stat. 1516.
Estonia	Nov. 8, 1923	Nov. 15, 1924	43 Stat. 1849.
	Oct. 10, 1934	May 7, 1935	49 Stat. 3190.
Fiji	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Aug. 17, 1973	24 UST 1965.
Finland	June 11, 1976	May 11, 1980	31 UST 944.
France	Jan. 6, 1909	July 27, 1911	37 Stat. 1526.
	Feb. 12, 1970	Apr. 3, 1971	22 UST 407.
Gambia	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Germany, Federal Republic of	June 20, 1978	Aug. 29, 1980	32 UST 1485.
Ghana	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Greece	May 6, 1931	Nov. 1, 1932	47 Stat. 2185.
	Sept. 2, 1937	Sept. 2, 1937	51 Stat. 357.
Grenada	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Guatemala	Feb. 27, 1903	Aug. 15, 1903	33 Stat. 2147.
	Feb. 20, 1940	Mar. 13, 1941	55 Stat. 1097.
Guyana	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Haiti	Aug. 9, 1904	June 28, 1905	34 Stat. 2858.
Honduras	Jan. 15, 1909	July 10, 1912	37 Stat. 1616.
	Feb. 21, 1927	June 5, 1928	45 Stat. 2489.
Hungary	July 3, 1856	Dec. 13, 1856	11 Stat. 691.
Iceland	Jan. 6, 1902		32 Stat. 1096.
	Nov. 6, 1905	Feb. 19, 1906	34 Stat. 2887.
India	Dec. 22, 1931	Mar. 9, 1942	47 Stat. 2122.
Iraq	June 7, 1934	Apr. 23, 1936	49 Stat. 3380.
Ireland	July 12, 1889		26 Stat. 1508.
	Dec. 13, 1900		32 Stat. 1864.
	Apr. 12, 1905		34 Stat. 2903.
	Aug. 9, 1842		8 Stat. 572.
Israel	Dec. 10, 1962	Dec. 5, 1963	14 UST 1707.
		Apr. 11, 1967	18 UST 382.
Italy	Jan. 18, 1973	Mar. 11, 1975	26 UST 493.
Jamaica	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Japan	Mar. 3, 1978	Mar. 26, 1980	31 UST 892.
Kenya	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Aug. 19, 1965	16 UST 1866.
Kiribati	June 8, 1972	Jan. 21, 1977	28 UST 227.
Latvia	Oct. 16, 1923	Mar. 1, 1924	43 Stat. 1738.
	Oct. 10, 1934	Mar. 29, 1935	49 Stat. 3131.
Lesotho	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Liberia	Nov. 1, 1937	Nov. 21, 1939	54 Stat. 1733.
Liechtenstein	May 20, 1936	June 28, 1937	50 Stat. 1337.
Lithuania	Apr. 9, 1924	Aug. 23, 1924	43 Stat. 1835.
	May 17, 1934	Jan. 8, 1935	49 Stat. 3077.
Luxembourg	Oct. 29, 1883	Aug. 13, 1884	23 Stat. 808.
	Apr. 24, 1935	Mar. 3, 1936	49 Stat. 3355.
Malawi	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Apr. 4, 1967	18 UST 1822.
Malaysia	Dec. 22, 1931	July 31, 1939	47 Stat. 2122.
Malta	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Mauritius	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Mexico	May 4, 1978	Jan. 25, 1980	31 UST 5059.
Monaco	Feb. 15, 1939	Mar. 28, 1940	54 Stat. 1780.
Nauru	Dec. 22, 1931	Aug. 30, 1935	47 Stat. 2122.
Netherlands	June 24, 1980	Sept. 15, 1983 [1]	TIAS 10733
New Zealand	Jan. 12, 1970	Dec. 8, 1970	22 UST 1.
Nicaragua	Mar. 1, 1905	July 14, 1907	35 Stat. 1869.
Nigeria	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Norway	June 9, 1977	Mar. 7, 1980	31 UST 5619.
Pakistan	Dec. 22, 1931	Mar. 9, 1942	47 Stat. 2122.
Panama	May 25, 1904	May 8, 1905	34 Stat. 2851.
Papua New Guinea	Dec. 22, 1931	Aug. 30, 1935	47 Stat. 2122.
Paraguay	May 24, 1973	May 7, 1974	25 UST 967.
Peru	Nov. 28, 1899	Feb. 22, 1901	31 Stat. 1921.
Poland	Nov. 22, 1927	July 6, 1929	46 Stat. 2282.
	Apr. 5, 1935	June 5, 1936	49 Stat. 3394.
Portugal	May 7, 1908	Nov. 14, 1908	35 Stat. 2071.
Romania	July 23, 1924	Apr. 7, 1925	44 Stat. 2020.
	Nov. 10, 1936	July 27, 1937	50 Stat. 1349.
Saint Christopher and Nevis	June 8, 1972	Jan. 21, 1977	28 UST 227.
Saint Lucia	June 8, 1972	Jan. 21, 1977	28 UST 227.
Saint Vincent and the Grenadines	June 8, 1972	Jan. 21, 1977	28 UST 227.
San Marino	Jan. 10, 1906	July 8, 1908	35 Stat. 1971.
	Oct. 10, 1934	June 28, 1935	49 Stat. 3198.
Seychelles	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Sierra Leone	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Singapore	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		June 10, 1969	20 UST 2764.
Solomon Islands	June 8, 1972	Jan. 21, 1977	28 UST 277.
South Africa	Dec. 18, 1947	Apr. 30, 1951	2 UST 884.
Spain	May 29, 1970	June 16, 1971	22 UST 737.
	Jan. 25, 1975	June 2, 1978	29 UST 2283.
Sri Lanka	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Surinam	June 2, 1887	July 11, 1889	26 Stat. 1481.
	Jan. 18, 1904	Aug. 28, 1904	33 Stat. 2257.
Swaziland	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		July 28, 1970	21 UST 1930.
Sweden	Oct. 24, 1961	Dec. 3, 1963	14 UST 1845.
Switzerland	May 14, 1900	Mar. 29, 1901	31 Stat. 1928.
	Jan. 10, 1935	May 16, 1935	49 Stat. 3192.
	Jan. 31, 1940	Apr. 8, 1941	55 Stat. 1140.
Tanzania	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
		Dec. 6, 1965	16 UST 2066.

Country	Date signed	Entered into force	Citation
Thailand	Dec. 30, 1922	Mar. 24, 1924	43 Stat. 1749.
Tonga	Dec. 22, 1931	Aug. 1, 1966	47 Stat. 2122.
		Apr. 13, 1977	28 UST 5290.
Trinidad and Tobago	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.
Turkey	June 7, 1979	Jan. 1, 1981	TIAS 9891.
Tuvalu	June 8, 1972	Jan. 21, 1977	28 UST 227.
		Apr. 25, 1980	32 UST 1310.
United Kingdom	June 8, 1972	Jan. 21, 1977	28 UST 227.
Uruguay	Mar. 11, 1905	June 4, 1908	35 Stat. 2028.
Venezuela	Jan. 19, 21, 1922.	Apr. 14, 1923	43 Stat. 1698.
Yugoslavia	Oct. 25, 1901	June 12, 1902	32 Stat. 1890.
Zambia	Dec. 22, 1931	June 24, 1935	47 Stat. 2122.

[1] For the Kingdom in Europe and Netherland Antilles.

Convention on Extradition

The United States is a party to the Multilateral Convention on Extradition [1] signed at Montevideo on Dec. 26, 1933, entered into force for the United States on Jan. 25, 1935, 49 Stat. 3111.

Other states which have become parties: Argentina, Chile,[2] Colombia, Dominican Republic, Ecuador,[2] El Salvador,[2] Guatemala, Honduras,[2] Mexico,[2] Nicaragua, Panama.

[1] Article 21 provides that the convention "does not abrogate or modify the bilateral or collective treaties, which at the present date are in force between the signatory States. Nevertheless, if any of said treaties lapse, the present Convention will take effect and become applicable immediately among the respective States . . .." Since the United States has preexisting bilateral extradition treaties with each of the other parties, the multilateral convention is presently inoperative for the United States.

[2] With reservation.

TITLE 21

FOOD AND DRUGS

CHAPTER 13—DRUG ABUSE PREVENTION AND CONTROL

As amended to January 1, 1985

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UNIFORM CONTROLLED SUBSTANCES ACT

Table of Jurisdictions Where the Uniform Controlled Substances Act has been Adopted.

The Code of the State of Maine contains provisions of both the Uniform Controlled Substances Act and the Uniform Narcotic Drug Act.

For text of Uniform Controlled Substances Act, and variation notes and annotation materials for adopting jurisdictions, see Uniform Laws Annotated, Master Edition, Volume 9.

Jurisdiction	Statutory Citation
Alabama	Code 1975, §§ 20–2–1 to 20–2–93.
Alaska	AS 11.71.010 to 11.71.900, 17.30.010 to 17.30.900.
Arizona	A.R.S. §§ 36–2501 to 36–2553.
Arkansas	Ark. Stats. §§ 82–2601 to 82–2643.
California	West's Ann. Health & Safety Code, §§ 11000 to 11651.
Colorado	C.R.S. 12–22–301 to 12–22–322.
Connecticut	C.G.S.A. §§ 21a–240 to 21a–308.
Delaware	16 Del.C. §§ 4701 to 4796.
District of Columbia	D.C.Code 1981, §§ 33–501 to 33–567.

Jurisdiction	Statutory Citation
Florida	West's F.S.A. §§ 893.01 to 893.15.
Georgia	O.C.G.A. §§ 16-13-20 to 16-13-55.
Guam	9 G.C.A. §§ 67.10 to 67.98.
Hawaii	HRS §§ 329-1 to 329-58.
Idaho	I.C. §§ 37-2701 to 37-2751.
Illinois	S.H.A. ch. 56½, ¶¶ 1100 to 1603.
Indiana	West's A.I.C. 35-48-1-1 to 35-48-1-14.
Iowa	I.C.A. §§ 204.101 to 204.602.
Kansas	K.S.A. 65-4101 to 65-4140.
Kentucky	KRS 218A.010 to 218A.991.
Louisiana	LSA-R.S. 40:961 to 40:995.
Maine	17-A M.R.S.A. §§ 1101 to 1116; 22 M.R.S.A. §§ 2361 to 2380.
Maryland	Code 1957, art. 27, §§ 276 to 302.
Massachusetts	M.G.L.A. c. 94C, §§ 1 to 48.
Michigan	M.C.L.A. §§ 333.7101 to 333.7545.
Minnesota	M.S.A. §§ 152.01 to 152.20.
Mississippi	Code 1972, §§ 41-29-101 to 41-29-175.
Missouri	V.A.M.S. §§ 195.010 to 195.320.
Montana	MCA 50-32-101 to 50-32-405.
Nebraska	R.R.S. 1943, § 28-401 et seq.
Nevada	N.R.S. 453.011 to 453.361.
New Jersey	N.J.S.A. 24:21-1 to 24:21-53.
New Mexico	NMSA 1978, §§ 30-31-1 to 30-31-40.
New York	McKinney's Public Health Law §§ 3300 to 3396.
North Carolina	G.S. §§ 90-86 to 90-113.8.
North Dakota	NDCC 19-03.1-01 to 19-03.1-43.
Ohio	R.C. §§ 3719.01 to 3719.99.
Oklahoma	63 Okl.St.Ann. §§ 2-101 to 2-610.
Oregon	ORS 475.005 to 475.285, 475.992 to 475.995.
Pennsylvania	35 P.S. §§ 780-101 to 780-144.
Puerto Rico	24 L.P.R.A. §§ 2101 to 2607.
Rhode Island	Gen.Laws 1956, §§ 21-28-1.01 to 21-28-6.02.
South Carolina	Code 1976, §§ 44-53-110 to 44-53-580.
South Dakota	SDCL 34-20B-1 to 34-20B-114.
Tennessee	T.C.A. §§ 39-6-401 to 39-6-419, 53-11-301 to 53-11-414.
Texas	Vernon's Ann.Civ.St. art. 4476-15.
Utah	U.C.A. 1953, §§ 58-37-1 to 58-37-19.
Virgin Islands	19 V.I.C. §§ 591 to 630a.
Virginia	Code 1950, § 54-524.1 et seq.
Washington	West's RCWA §§ 69.50.101 to 69.50.608.
West Virginia	Code 60A-1-101 to 60A-6-605.
Wisconsin	W.S.A. 161.001 to 161.62.
Wyoming	W.S. 1977, §§ 35-7-1001 to 35-7-1055.

SUBCHAPTER I—CONTROL AND ENFORCEMENT

PART A—INTRODUCTORY PROVISIONS

§ 801. Congressional findings and declarations

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

(Pub.L. 91-513, Title II, § 101, Oct. 27, 1970, 84 Stat. 1242.)

References in Text. This subchapter, wherever referred to in this subchapter, was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act".

Short Title of 1984 Amendments. Section 501 of Pub.L. 98–473, Title II, c. V, Oct. 12, 1984, 98 Stat. 2068, provided that "This chapter [chapter V of Title II of Pub.L. 98–473] may be cited as the 'Controlled Substances Penalties Amendments Act of 1984'."

Section 506(a) of Pub.L. 98–473, Title II, c. V, Oct. 12, 1984, 98 Stat. 2070, provided that "This part [part B of chapter V of Title II of Pub.L. 98–473] may be cited as the 'Dangerous Drug Diversion Control Act of 1984'."

Short Title. Section 100 of Pub.L. 91–513 provided that: "This title [enacting this subchapter, amending sections 321, 331, 333, 334, 360, 372, and 381 of Title 21, U.S.C.A., Food and Drugs, sections 1114 and 1952 of Title 18, U.S.C.A., Crimes and Criminal Procedure, and section 242a of Title 42, U.S.C.A., The Public Health and Welfare, repealing section 360a of Title 21, and enacting provisions set out as notes under this section and sections 321 and 822 of Title 21] may be cited as the 'Controlled Substances Act'."

EXECUTIVE ORDER NO. 11727

July 6, 1973, 38 F.R. 18357

DRUG LAW ENFORCEMENT

Reorganization Plan No. 2 of 1973 [set out in the Appendix to Title 5, Government Organization and Employees], which becomes effective on July 1, 1973, among other things establishes a Drug Enforcement Administration in the Department of Justice. In my message to the Congress transmitting that plan, I stated that all functions of the Office for Drug Abuse Law Enforcement (established pursuant to Executive Order No. 11641 of January 28, 1972) and the Office of National Narcotics Intelligence (established pursuant to Executive Order No. 11676 of July 27, 1972) would, together with other related functions, be merged in the new Drug Enforcement Administration.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and laws of the United States, including section 5317 of title 5 of the United States Code, as amended [section 5317 of Title 5, Government Organization and Employees], it is hereby ordered as follows:

Section 1. The Attorney General, to the extent permitted by law, is authorized to coordinate all activities of executive branch departments and agencies which are directly related to the enforcement of laws respecting narcotics and dangerous drugs. Each department and agency of the Federal Government shall, upon request and to the extent permitted by law, assist the Attorney General in the performance of functions assigned to him pursuant to this order, and the Attorney General may, in carrying out those functions, utilize the services of any other agencies, Federal and State, as may be available and appropriate.

Sec. 2. Executive Order No. 11641 of January 28, 1972, is revoked and the Attorney General shall provide for the reassignment of the functions of the Office for Drug Abuse Law Enforcement and for the abolishment of that Office.

Sec. 3. Executive Order No. 11676 of July 27, 1972, is hereby revoked and the Attorney General shall provide for the reassignment of the functions of the Office of National Narcotics Intelligence and for the abolishment of that Office.

Sec. 4. Section 1 of Executive Order No. 11708 of March 23, 1973, as amended, placing certain positions in level IV of the Executive Schedule is hereby further amended by deleting—

(1) "(6) Director, Office for Drug Abuse Law Enforcement, Department of Justice."; and

(2) "(7) Director, Office of National Narcotics Intelligence, Department of Justice."

Sec. 5. The Attorney General shall provide for the winding up of the affairs of the two offices and for the reassignment of their functions.

Sec. 6. This order shall be effective as of July 1, 1973.

RICHARD NIXON

§ 801a. Congressional findings and declarations

The Congress makes the following findings and declarations:

(1) The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for nonscientific and nonmedical purposes, and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate uses of psychotropic substances in this country. Abuse of psychotropic substances has become a phenomenon common to many countries, however, and is not confined to national borders. It is, therefore, essential that the United States cooperate with other nations in establishing effective controls over international traffic in such substances.

(2) The United States has joined with other countries in executing an international treaty, entitled the Convention on Psychotropic Substances and signed at Vienna, Austria, on February 21, 1971, which is designed to establish suitable controls over the manufacture, distribution, transfer, and use of certain psychotropic substances. The Convention is not self-executing, and the obligations of the United States thereunder may only be performed pursuant to appropriate legislation. It is the intent of the Congress that the amendments made by this Act, together with existing law, will enable the United States to meet all of its obligations under the Convention and that no further legislation will be necessary for that purpose.

(3) In implementing the Convention on Psychotropic Substances, the Congress intends that, consistent with the obligations of the United

States under the Convention, control of psychotropic substances in the United States should be accomplished within the framework of the procedures and criteria for classification of substances provided in the Comprehensive Drug Abuse Prevention and Control Act of 1970. This will insure that (A) the availability of psychotropic substances to manufacturers, distributors, dispensers, and researchers for useful and legitimate medical and scientific purposes will not be unduly restricted; (B) nothing in the Convention will interfere with bona fide research activities; and (C) nothing in the Convention will interfere with ethical medical practice in this country as determined by the Secretary of Health and Human Services on the basis of a consensus of the views of the American medical and scientific community.

(Pub.L. 95–633, Title I, § 101, Nov. 10, 1978, 92 Stat. 3768; Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695.)

References in Text. This Act, referred to in par. (2), is Pub.L. 95–633, Nov. 10, 1978, 92 Stat. 2768, known as the Psychotropic Substances Act of 1978, which enacted this section and sections 830, and 852 of this title, amended sections 352, 802, 811, 812, 823, 827, 841 to 843, 872, 881, 952, 953, and 965 of Title 21, U.S.C.A., Food and Drugs, and section 242 of Title 42, U.S.C.A., The Public Health and Welfare, and enacted provisions set out as notes under this section and sections 801, 812, and 830 of Title 21.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in par. (3), is Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1236, as amended, which is classified principally to this chapter.

Change of Name. "Secretary of Health and Human Services" was substituted for "Secretary of Health, Education, and Welfare" on authority of Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, which is classified to section 3508 of Title 20, U.S.C.A., Education.

§ 802. Definitions

As used in this subchapter:

(1) The term "addict" means any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.

(2) The term "administer" refers to the direct application of a controlled substance to the body of a patient or research subject by—

(A) a practitioner (or, in his presence, by his authorized agent), or

(B) the patient or research subject at the direction and in the presence of the practitioner,

whether such application be by injection, inhalation, ingestion, or any other means.

(3) The term "agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser; except that such term does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman, when acting in the usual and lawful course of the carrier's or warehouseman's business.

(4) The term "Drug Enforcement Administration" means the Drug Enforcement Administration in the Department of Justice.

(5) The term "control" means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954.

(7) The term "counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

(8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.

(9) The term "depressant or stimulant substance" means—

(A) a drug which contains any quantity of (i) barbituric acid or any of the salts of barbituric acid; or (ii) any derivative of barbituric acid which has been designated by the Secretary as habit forming under section 352(d) of this title; or

(B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(C) lysergic acid diethylamide; or

(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

(12) The term "drug" has the meaning given that term by section 321(g)(1) of this title.

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

(14) The term "isomer" means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c), the term "isomer" means the optical, positional, or geometric isomer. As used in schedule II(a)(4), the term "isomer" means the optical or geometric isomer.

(15) The term "manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice. The term "manufacturer" means a person who manufactures a drug or other substance.

(16) The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(17) The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

(E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

(18) The term "opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.

(19) The term "opium poppy" means the plant of the species Papaver somniferum L., except the seed thereof.

(20) The term "poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(21) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

(22) The term "production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(23) The term "immediate precursor" means a substance—

(A) which the Attorney General has found to be and by regulation designated as being the principal compound used, or produced primarily for use, in the manufacture of a controlled substance;

(B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; and

(C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

(24) The term "Secretary", unless the context otherwise indicates, means the Secretary of Health and Human Services.

(25) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the Canal Zone.

(26) The term "ultimate user" means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

(27) The term "United States", when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States.

(28) The term "maintenance treatment" means the dispensing, for a period in excess of twenty-one days, of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs.

(29) The term "detoxification treatment" means the dispensing, for a period not in excess of one hundred and eighty days, of a narcotic drug in decreasing doses to an individual in order to alleviate adverse physiological or psychological effects incident to withdrawal from the continuous or sustained use of a narcotic drug and as a method of bringing the individual to a narcotic drug-free state within such period.

(30) The term "Convention on Psychotropic Substances" means the Convention on Psychotropic Substances signed at Vienna, Austria, on February 21, 1971; and the term "Single Convention on Narcotic Drugs" means the Single Convention on Narcotic Drugs signed at New York, New York, on March 30, 1961.

(Pub.L. 91–513, Title II, § 102, Oct. 27, 1970, 84 Stat. 1242; Pub.L. 93–281, § 2, May 14, 1974, 88 Stat. 124; Pub.L. 95–633, Title I, § 102(b), Nov. 10, 1978, 92 Stat. 3772; Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695; Pub.L. 96–132, § 16(a), Nov. 30, 1979, 93 Stat. 1049; Pub.L. 98–473, Title II, § 507(a), (b), Oct. 12, 1984, 98 Stat. 2071; Pub.L. 98–509, Title III, § 301(a), Oct. 19, 1984, 98 Stat. 2364.)

References in Text. Subtitle E of the Internal Revenue Code of 1954, referred to in par. (6), is classified to section 5001 et seq. of Title 26, U.S.C.A., Internal Revenue Code.

Codification. Amendment by section 301(a) of Pub.L. 98–509, Oct. 19, 1984, 98 Stat. 2364, to par. (28) which substituted "one hundred and eighty" for "twenty-one" was executed to par. (29), which had been par. (28) prior to its redesignation by Pub.L. 98–473, Title II, § 507(a), Oct. 12, 1984, 98 Stat. 2071, as the probable intent of Congress.

Change of Name. "Secretary of Health and Human Services" was substituted for "Secretary of Health, Education, and Welfare" on authority of Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, which is classified to section 3508 of Title 20, U.S.C.A., Education.

Promulgation of Regulations for Administration of Amendment by Alcohol Abuse, Drug Abuse, and Mental Health Amendments of 1984; Inclusion of Findings in Report. Section 301(b) of Pub.L. 98–509, Oct. 19, 1984, 98 Stat. 2364, provided that: "The Secretary of Health and Human Services shall, within ninety days of the date of the enactment of this Act [Oct. 19, 1984], promulgate regulations for the administration of section 102(28) of the Controlled Substances Act as amended by subsection (a) [probably par. 29 of this section] and shall include in the first report submitted under section 505(b) of the Public Health Service Act [section 290aa–4 of Title 42, The Public Health and Welfare] after the expiration of such ninety days the findings of the Secretary with respect to the effect of the amendment made by subsection (a) [amending par. (29) of this section]."

§ 803. Repealed. Pub.L. 95–137, § 1(b), Oct. 18, 1977, 91 Stat. 1169.

Part B—Authority to Control; Standards and Schedules

§ 811. Authority and criteria for classification of substances

Rules and regulations of Attorney General; hearing

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any scientific or medical considerations involved in paragraphs (1), (4), and (5) of such subsection. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data constitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal, as the case may be, under subsection (a) of this section.

Factors determinative of control or removal from schedules

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances

(d)(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health and Human Services who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The

Secretary of Health and Human Services shall prepare for transmission through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall transmit timely notice to the Secretary of Health and Human Services of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health and Human Services shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health and Human Services, after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health and Human Services nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsections (a) and (b) of this section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health and Human Services concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health and Human Services does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall—

(i) if he deems that additional controls are necessary to protect the public health and safety, recommended to the Attorney General that he initiate proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified acceptance, within the period specified in the Convention, pursuant to paragraph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of the United Nations, in accordance with paragraph 8 of article 2 of the Convention, of the scheduling decision; or

(iv) in the case of a schedule notice, request the Secretary of State to take appropriate action under the Convention to initiate proceedings to remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health and Human Services, that proceedings initiated under recommendations made under paragraph (B) or (C)(i) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirements of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney

General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health and Human Services and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)—

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention,

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 812(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health and Human Services or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review of scheduling decisions under such Convention, based on new or additional information.

Immediate precursors

(e) The Attorney General may, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section, place an immediate precursor in the same schedule in which the controlled substance of which it is an immediate precursor is placed or in any other schedule with a higher numerical designation. If the Attorney General designates a substance as an immediate precursor and places it in a schedule, other substances shall not be placed in a schedule solely because they are its precursors.

Abuse potential

(f) If, at the time a new-drug application is submitted to the Secretary for any drug having a stimulant, depressant, or hallucinogenic effect on the central nervous system, it appears that such drug has an abuse potential, such information shall be forwarded by the Secretary to the Attorney General.

Non-narcotic substances sold over counter without prescription; dextromethorphan

(g)(1) The Attorney General shall by regulation exclude any non-narcotic substance from a sched-

ule if such substance may, under the Federal Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.

(2) Dextromethorphan shall not be deemed to be included in any schedule by reason of enactment of this subchapter unless controlled after October 27, 1970 pursuant to the foregoing provisions of this section.

(3) The Attorney General may, by regulation, exempt any compound, mixture, or preparation containing a controlled substance from the application of all or any part of this subchapter if he finds such compound, mixture, or preparation meets the requirements of one of the following categories:

(A) A mixture, or preparation containing a nonnarcotic controlled substance, which mixture or preparation is approved for prescription use, and which contains one or more other active ingredients which are not listed in any schedule and which are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse.

(B) A compound, mixture, or preparation which contains any controlled substance, which is not for administration to a human being or animal, and which is packaged in such form or concentration, or with adulterants or denaturants, so that as packaged it does not present any significant potential for abuse.

(h) Temporary scheduling to avoid imminent hazards to public safety

(1) If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to the requirements of subsection (b) of this section relating to the Secretary of Health and Human Services, schedule such substance in schedule I if the substance is not listed in any other schedule in section 812 of this title or if no exemption or approval is in effect for the substance under section 355 of this title. Such an order may not be issued before the expiration of thirty days from—

(A) the date of the publication by the Attorney General of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and

(B) the date the Attorney General has transmitted the notice required by paragraph (4).

(2) The scheduling of a substance under this subsection shall expire at the end of one year from the date of the issuance of the order scheduling such substance, except that the Attorney General may, during the pendency of proceedings under subsection (a)(1) of this section with respect to the substance, extend the temporary scheduling for up to six months.

(3) When issuing an order under paragraph (1), the Attorney General shall be required to consider, with respect to the finding of an imminent hazard to the public safety, only those factors set forth in paragraphs (4), (5), and (6) of subsection (c) of this section, including actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution.

(4) The Attorney General shall transmit notice of an order proposed to be issued under paragraph (1) to the Secretary of Health and Human Services. In issuing an order under paragraph (1), the Attorney General shall take into consideration any comments submitted by the Secretary in response to a notice transmitted pursuant to this paragraph.

(5) An order issued under paragraph (1) with respect to a substance shall be vacated upon the conclusion of a subsequent rulemaking proceeding initiated under subsection (a) of this section with respect to such substance.

(6) An order issued under paragraph (1) is not subject to judicial review.

(Pub.L. 91–513, Title II, § 201, Oct. 27, 1970, 84 Stat. 1245; Pub.L. 95–633, Title I, § 102(a), Nov. 10, 1978, 92 Stat. 3769; Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695; Pub.L. 98–473, Title II, §§ 508, 509(a), Oct. 12, 1984, 98 Stat. 2071, 2072.)

References in Text. The Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (d)(3) and (g)(1), is Act June 25, 1938, c. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (section 301 et seq.) of Title 21, U.S.C.A., Food and Drugs.

Schedules IV and V, referred to in subsec. (d)(4)(A), (B), are set out in section 812(c) of this title.

The Psychotropic Substances Act of 1978, referred to in subsec. (d)(5), is Pub.L. 95–633, Nov. 11, 1978, 92 Stat. 3768, which enacted sections 801a, 830, and 852 of Title 21, U.S.C.A., Food and Drugs, amended this section and sections 352, 802, 812, 823, 827, 841 to 843, 872, 881, 952, 953, and 965 of Title 21 and section 242a of Title 42, U.S.C.A., The Public Health and Welfare, and enacted provisions set out as notes under sections 801, 801a, 812, and 830 of Title 21.

Change of Name. "Secretary of Health and Human Services" was substituted for "Secretary of Health, Education, and Welfare" on authority of Pub.L. 96–88, Title V, § 509, Oct. 17, 1979, 93 Stat. 695, which is classified to section 3508 of Title 20, U.S.C.A., Education.

§ 812. Schedules of controlled substances

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The

schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V.—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetylmethadol.
(2) Allylprodine.
(3) Alphacetylmathadol.
(4) Alphameprodine.
(5) Alphamethadol.
(6) Benzethidine.
(7) Betacetylmethadol.
(8) Betameprodine.
(9) Betamethadol.
(10) Betaprodine.
(11) Clonitazene.
(12) Dextromoramide.
(13) Dextrorphan.
(14) Diampromide.
(15) Diethylthiambutene.
(16) Dimenoxadol.
(17) Dimepheptanol.
(18) Dimethylthiambutene.
(19) Dioxaphetyl butyrate.
(20) Dipipanone.
(21) Ethylmethylthiambutene.
(22) Etonitazene.
(23) Etoxeridine.
(24) Furethidine.
(25) Hydroxypethidine.

(26) Ketobemidone.
(27) Levomoramide.
(28) Levophenacylmorphan.
(29) Morpheridine.
(30) Noracymethadol.
(31) Norlevorphanol.
(32) Normethadone.
(33) Norpipanone.
(34) Phenadoxone.
(35) Phenampromide.
(36) Phenomorphan.
(37) Phenoperidine.
(38) Piritramide.
(39) Proheptazine.
(40) Properidine.
(41) Racemoramide.
(42) Trimeperidine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine.
(2) Acetyldihydrocodeine.
(3) Benzylmorphine.
(4) Codeine methylbromide.
(5) Codeine-N-Oxide.
(6) Cyprenorphine.
(7) Desomorphine.
(8) Dihydromorphine.
(9) Etorphine.
(10) Heroin.
(11) Hydromorphinol.
(12) Methyldesorphine.
(13) Methylhydromorphine.
(14) Morphine methylbromide.
(15) Morphine methylsulfonate.
(16) Morphine-N-Oxide.
(17) Myrophine.
(18) Nicocodeine.
(19) Nicomorphine.
(20) Normorphine.
(21) Pholcodine.
(22) Thebacon.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) 3, 4-methylenedioxy amphetamine.
(2) 5-methoxy-3, 4-methylenedioxy amphetamine.
(3) 3, 4, 5-trimethoxy amphetamine.
(4) Bufotenine.
(5) Diethyltryptamine.
(6) Dimethyltryptamine.
(7) 4-methyl-2, 5-dimethoxyamphetamine.
(8) Ibogaine.
(9) Lysergic acid diethylamide.
(10) Marihuana.
(11) Mescaline.
(12) Peyote.
(13) N-ethyl-3-piperidyl benzilate.
(14) N-methyl-3-piperidyl benzilate.
(15) Psilocybin.
(16) Psilocyn.
(17) Tetrahydrocannabinols.

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.

(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.
(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine.
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.
(20) Racemethorphan.
(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

Schedule III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.
(2) Phenmetrazine and its salts.
(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.
(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
(2) Chorhexadol.
(3) Glutethimide.
(4) Lysergic acid.
(5) Lysergic acid amide.
(6) Methyprylon.
(7) Phencyclidine.
(8) Sulfondiethylmethane.
(9) Sulfonethylmethane.
(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.
(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.
(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

Schedule IV

(1) Barbital.
(2) Chloral betaine.
(3) Chloral hydrate.
(4) Ethchlorvynol.
(5) Ethinamate.

(6) Methohexital.

(7) Meprobamate.

(8) Methylphenobarbital.

(9) Paraldehyde.

(10) Petrichloral.

(11) Phenobarbital.

Schedule V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.

(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.

(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.

(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.

(Pub.L. 91–513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95–633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98–473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072.)

Placement of Pipradrol and SPA in Schedule IV to Carry Out Obligation Under Convention on Psychotropic Substances. Section 102(c) of Pub.L. 95–633 provided that: "For the purpose of carrying out the minimum United States obligations under paragraph 7 of article 2 of the Convention on Psychotropic Substances, signed at Vienna, Austria, on February 21, 1971, with respect to pipradrol and SPA (also known as (-)-1-dimethylamino-1,2-diphenylethane), the Attorney General shall by order, made without regard to sections 201 and 202 of the Controlled Substances Act [this section and section 811 of this title], place such drugs in schedule IV of such Act [see subsec. (c) of this section]."

Provision of section 102(c) of Pub.L. 95–633, set out above, effective July 15, 1980, the date the Convention on Psychotrophic Substances entered into force in the United States.

Part C—Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances

§ 821. Rules and regulations

The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances.

(Pub.L. 91–513, Title II, § 301, Oct. 27, 1970, 84 Stat. 1253.)

§ 822. Persons required to register

Annual registration

(a)(1) Every person who manufactures or distributes any controlled substance, or who proposes to engage in the manufacture or distribution of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

(2) Every person who dispenses, or who proposes to dispense, any controlled substance, shall obtain from the Attorney General a registration issued in accordance with the rules and regulations promulgated by him. The Attorney General shall, by regulation, determine the period of such registrations. In no event, however, shall such registrations be issued for less than one year nor for more than three years.

Authorized activities

(b) Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

Exceptions

(c) The following persons shall not be required to register and may lawfully possess any controlled substance under this subchapter:

(1) An agent or employee of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent or employee is acting in the usual course of his business or employment.

(2) A common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance is in the usual course of his business or employment.

(3) An ultimate user who possesses such substance for a purpose specified in section 802(25) of this title.

Waiver

(d) The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he

finds it consistent with the public health and safety.

Separate registration

(e) A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances.

Inspection

(f) The Attorney General is authorized to inspect the establishment of a registrant or applicant for registration in accordance with the rules and regulations promulgated by him.

(Pub.L. 91–513, Title II, § 302, Oct. 27, 1970, 84 Stat. 1253; Pub.L. 98–473, Title II, § 510, Oct. 12, 1984, 98 Stat. 2072.)

§ 823. Registration requirements

Manufacturers of controlled substances in schedules I and II

(a) The Attorney General shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

Distributors of controlled substances in schedules I and II

(b) The Attorney General shall register an applicant to distribute a controlled substance in schedule I or II unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;

(2) compliance with applicable State and local law;

(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

Limits of authorized activities

(c) Registration granted under subsections (a) and (b) of this section shall not entitle a registrant to (1) manufacture or distribute controlled substances in schedule I or II other than those specified in the registration, or (2) manufacture any quantity of those controlled substances in excess of the quota assigned pursuant to section 826 of this title.

Manufacturers of controlled substances in schedules III, IV, and V

(d) The Attorney General shall register an applicant to manufacture controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule III, IV, or V compounded therefrom into other than legitimate medical, scientific, or industrial channels;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture, distribution, and dispensing of controlled substances, and the existence in the establishment of effective controls against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

Distributors of controlled substances in schedules III, IV, and V

(e) The Attorney General shall register an applicant to distribute controlled substances in schedule III, IV, or V, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) maintenance of effective controls against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;

(2) compliance with applicable State and local law;

(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

Research; pharmacies; research applications; construction of Article 7 of Convention on Psychotropic Substances

(f) The Attorney General shall register practitioners (including pharmacies, as distinguished from pharmacists) to dispense, or conduct research with, controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense, or conduct research with respect to, controlled substances under the laws of the State in which he practices. The Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Separate registration under this part for practitioners engaging in research with controlled substances in schedule II, III, IV, or V, who are already registered under this part in another capacity, shall not be required. Registration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary, who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol. The Secretary, in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use. Registration for the purpose of bona fide research with controlled substances in schedule I by a practitioner deemed qualified by the Secretary may be denied by the Attorney General only on a ground specified in section 824(a) of this title. Article 7 of the Convention on Psychotropic Substances shall not be construed to prohibit, or impose additional restrictions upon, research involving drugs or other substances scheduled under the convention which is conducted in conformity with this subsection and other applicable provisions of this subchapter.

Practitioners dispensing narcotic drugs for narcotic treatment; annual registration; separate registration; qualifications

(g) Practitioners who dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment shall obtain annually a separate registration for that purpose. The Attorney General shall register an applicant to dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment (or both)

(1) if the applicant is a practitioner who is determined by the Secretary to be qualified (under standards established by the Secretary) to engage in the treatment with respect to which registration is sought;

(2) if the Attorney General determines that the applicant will comply with standards established by the Attorney General respecting (A) security of stocks of narcotic drugs for such treatment, and (B) the maintenance of records (in accordance with section 827 of this title) on such drugs; and

(3) if the Secretary determines that the applicant will comply with standards established by the Secretary (after consultation with the Attor-

ney General) respecting the quantities of narcotic drugs which may be provided for unsupervised use by individuals in such treatment.

(Pub.L. 91-513, Title II, § 303, Oct. 27, 1970, 84 Stat. 1253; Pub.L. 93-281, § 3, May 14, 1974, 88 Stat. 124; Pub.L. 95-633, Title I, § 109, Nov. 10, 1978, 92 Stat. 3773; Pub.L. 98-473, Title II, § 511, Oct. 12, 1984, 98 Stat. 2073.)

References in Text. Schedules I, II, III, IV, and V, referred to in text are set out in section 812(c) of this title.

§ 824. Denial, revocation, or suspension of registration

Grounds

(a) A registration pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance may be suspended or revoked by the Attorney General upon a finding that the registrant—

(1) has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;

(2) has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance;

(3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or has had the suspension, revocation, or denial of his registration recommended by competent State authority; or

(4) has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.

A registration pursuant to section 823(g) of this title to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 823(g) of this title.

Limits of revocation or suspension

(b) The Attorney General may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

Service of show cause order; proceedings

(c) Before taking action pursuant to this section, or pursuant to a denial of registration under section 823 of this title, the Attorney General shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended. The order to show cause shall contain a statement of the basis thereof and shall call upon the applicant or registrant to appear before the Attorney General at a time and place stated in the order, but in no event less than thirty days after the date of receipt of the order. Proceedings to deny, revoke, or suspend shall be conducted pursuant to this section in accordance with subchapter II of chapter 5 of Title 5. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this subchapter or any other law of the United States.

Suspension of registration in cases of imminent danger

(d) The Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this section, in cases where he finds that there is an imminent danger to the public health or safety. A failure to comply with a standard referred to in section 823(g) of this title may be treated under this subsection as grounds for immediate suspension of a registration granted under such section. A suspension under this subsection shall continue in effect until the conclusion of such proceedings, including judicial review thereof, unless sooner withdrawn by the Attorney General or dissolved by a court of competent jurisdiction.

Suspension and revocation of quotas

(e) The suspension or revocation of a registration under this section shall operate to suspend or revoke any quota applicable under section 826 of this title.

Disposition of controlled substances

(f) In the event the Attorney General suspends or revokes a registration granted under section 823 of this title, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the Attorney General, be placed under seal. No disposition may be made of any controlled substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded except that a court, upon application therefor, may at any time order the sale of perishable controlled substances. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances (or proceeds of sale deposited in court) shall be forfeit-

ed to the United States; and the Attorney General shall dispose of such controlled substances in accordance with section 881(e) of this title. All right, title, and interest in such controlled substances shall vest in the United States upon a revocation order becoming final.

Seizure or placement under seal of controlled substances

(g) The Attorney General may, in his discretion, seize or place under seal any controlled substances owned or possessed by a registrant whose registration has expired or who has ceased to practice or do business in the manner contemplated by his registration. Such controlled substances shall be held for the benefit of the registrant, or his successor in interest. The Attorney General shall notify a registrant, or his successor in interest, who has any controlled substance seized or placed under seal of the procedures to be followed to secure the return of the controlled substance and the conditions under which it will be returned. The Attorney General may not dispose of any controlled substance seized or placed under seal under this subsection until the expiration of one hundred and eighty days from the date such substance was seized or placed under seal.

(Pub.L. 91–513, Title II, § 304, Oct. 27, 1970, 84 Stat. 1255; Pub.L. 93–281, § 4, May 14, 1974, 88 Stat. 125; Pub.L. 98–473, Title II, §§ 304, 512, 513, Oct. 12, 1984, 98 Stat. 2050, 2073.)

References in Text. Subchapter II of this chapter, referred to in subsec. (a)(1), (2), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 825. Labeling and packaging

Symbol

(a) It shall be unlawful to distribute a controlled substance in a commercial container unless such container, when and as required by regulations of the Attorney General, bears a label (as defined in section 321(k) of this title) containing an identifying symbol for such substance in accordance with such regulations. A different symbol shall be required for each schedule of controlled substances.

Unlawful distribution without identifying symbol

(b) It shall be unlawful for the manufacturer of any controlled substance to distribute such substance unless the labeling (as defined in section 321(m) of this title) of such substance contains, when and as required by regulations of the Attorney General, the identifying symbol required under subsection (a) of this section.

Warning on label

(c) The Secretary shall prescribe regulations under section 353(b) of this title which shall provide that the label of a drug listed in schedule II, III, or IV shall, when dispensed to or for a patient, contain a clear, concise warning that it is a crime to transfer the drug to any person other than the patient.

Containers to be securely sealed

(d) It shall be unlawful to distribute controlled substances in schedule I or II, and narcotic drugs in schedule III or IV, unless the bottle or other container, stopper, covering, or wrapper thereof is securely sealed as required by regulations of the Attorney General.

(Pub.L. 91–513, Title II, § 305, Oct. 27, 1970, 84 Stat. 1256.)

References in Text. Schedules I, II, III, and IV, referred to in subsecs. (c) and (d), are set out in section 812(c) of this title.

§ 826. Production quotas for controlled substances

Establishment of total annual needs

(a) The Attorney General shall determine the total quantity and establish production quotas for each basic class of controlled substance in schedules I and II to be manufactured each calendar year to provide for the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment and maintenance of reserve stocks. Production quotas shall be established in terms of quantities of each basic class of controlled substance and not in terms of individual pharmaceutical dosage forms prepared from or containing such a controlled substance.

Individual production quotas; revised quotas

(b) The Attorney General shall limit or reduce individual production quotas to the extent necessary to prevent the aggregate of individual quotas from exceeding the amount determined necessary each year by the Attorney General under subsection (a) of this section. The quota of each registered manufacturer for each basic class of controlled substance in schedule I or II shall be revised in the same proportion as the limitation or reduction of the aggregate of the quotas. However, if any registrant, before the issuance of a limitation or reduction in quota, has manufactured in excess of his revised quota, the amount of the

excess shall be subtracted from his quota for the following year.

Manufacturing quotas for registered manufacturers

(c) On or before October 1 of each year, upon application therefor by a registered manufacturer, the Attorney General shall fix a manufacturing quota for the basic classes of controlled substances in schedules I and II that the manufacturer seeks to produce. The quota shall be subject to the provisions of subsections (a) and (b) of this section. In fixing such quotas, the Attorney General shall determine the manufacturer's estimated disposal, inventory, and other requirements for the calendar year; and, in making his determination, the Attorney General shall consider the manufacturer's current rate of disposal, the trend of the national disposal rate during the preceding calendar year, the manufacturer's production cycle and inventory position, the economic availability of raw materials, yield and stability problems, emergencies such as strikes and fires, and other factors.

Quotas for registrants who have not manufactured controlled substance during one or more preceding years

(d) The Attorney General shall, upon application and subject to the provisions of subsections (a) and (b) of this section, fix a quota for a basic class of controlled substance in schedule I or II for any registrant who has not manufactured that basic class of controlled substance during one or more preceding calendar years. In fixing such quota, the Attorney General shall take into account the registrant's reasonably anticipated requirements for the current year; and, in making his determination of such requirements, he shall consider such factors specified in subsection (c) of this section as may be relevant.

Quota increases

(e) At any time during the year any registrant who has applied for or received a manufacturing quota for a basic class of controlled substance in schedule I or II may apply for an increase in that quota to meet his estimated disposal, inventory, and other requirements during the remainder of that year. In passing upon the application the Attorney General shall take into consideration any occurrences since the filing of the registrant's initial quota application that may require an increased manufacturing rate by the registrant during the balance of the year. In passing upon the application the Attorney General may also take into account the amount, if any, by which the determination of the Attorney General under subsection (a) of this section exceeds the aggregate of the quotas of all registrants under this section.

Incidental production exception

(f) Notwithstanding any other provisions of this subchapter, no registration or quota may be required for the manufacture of such quantities of controlled substances in schedules I and II as incidentally and necessarily result from the manufacturing process used for the manufacture of a controlled substance with respect to which its manufacturer is duly registered under this subchapter. The Attorney General may, by regulation, prescribe restrictions on the retention and disposal of such incidentally produced substances.

(Pub.L. 91-513, Title II, § 306, Oct. 27, 1970, 84 Stat. 1257; Pub.L. 94-273, § 3(16), Apr. 21, 1976, 90 Stat. 377.)

References in Text. Schedules I and II, referred to in text, are set out in section 812(c) of this title.

§ 827. Records and reports of registrants

Inventory

(a) Except as provided in subsection (c) of this section—

(1) every registrant under this subchapter shall, on May 1, 1971, or as soon thereafter as such registrant first engages in the manufacture, distribution, or dispensing of controlled substances, and every second year thereafter, make a complete and accurate record of all stocks thereof on hand, except that the regulations prescribed under this section shall permit each such biennial inventory (following the initial inventory required by this paragraph) to be prepared on such registrant's regular general physical inventory date (if any) which is nearest to and does not vary by more than six months from the biennial date that would otherwise apply;

(2) on the effective date of each regulation of the Attorney General controlling a substance that immediately prior to such date was not a controlled substance, each registrant under this subchapter manufacturing, distributing, or dispensing such substance shall make a complete and accurate record of all stocks thereof on hand; and

(3) on and after May 1, 1971, every registrant under this subchapter manufacturing, distributing, or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered, or otherwise disposed of by him, except that this paragraph shall not require the maintenance of a perpetual inventory.

Availability of records

(b) Every inventory or other record required under this section (1) shall be in accordance with, and contain such relevant information as may be required by, regulations of the Attorney General, (2) shall (A) be maintained separately from all other records of the registrant, or (B) alternatively, in the case of nonnarcotic controlled substances, be in such form that information required by the Attorney General is readily retrievable from the ordinary business records of the registrant, and (3) shall be kept and be available, for at least two years, for inspection and copying by officers or employees of the United States authorized by the Attorney General.

Nonapplicability

(c) The foregoing provisions of this section shall not apply—

(1)(A) to the prescribing of controlled substances in schedule II, III, IV, or V by practitioners acting in the lawful course of their professional practice unless such substance is prescribed in the course of maintenance or detoxification treatment of an individual; or

(B) to the administering of a controlled substance in schedule II, III, IV, or V unless the practitioner regularly engages in the dispensing or administering of controlled substances and charges his patients, either separately or together with charges for other professional services, for substances so dispensed or administered or unless such substance is administered in the course of maintenance treatment or detoxification treatment of an individual;

(2)(A) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in research conducted in conformity with an exemption granted under section 355(i) or 360b(j) of this title;

(B) to the use of controlled substances, at establishments registered under this subchapter which keep records with respect to such substances, in preclinical research or in teaching; or

(3) to the extent of any exemption granted to any person, with respect to all or part of such provisions, by the Attorney General by or pursuant to regulation on the basis of a finding that the application of such provisions (or part thereof) to such person is not necessary for carrying out the purposes of this subchapter.

Nothing in the Convention on Psychotropic Substances shall be construed as superseding or otherwise affecting the provisions of paragraph (1)(B), (2), or (3) of this subsection.

Periodic reports to Attorney General

(d) Every manufacturer registered under section 823 of this title shall, at such time or times and in such form as the Attorney General may require, make periodic reports to the Attorney General of every sale, delivery, or other disposal by him of any controlled substance, and each distributor shall make such reports with respect to narcotic controlled substances, identifying by the registration number assigned under this subchapter the person or establishment (unless exempt from registration under section 822(d) of this title) to whom such sale, delivery, or other disposal was made.

Reports and records required by drug conventions

(e) In addition to the reporting and recordkeeping requirements under any other provision of this subchapter, each manufacturer registered under section 823 of this title shall, with respect to narcotic and nonnarcotic controlled substances manufactured by it, make such reports to the Attorney General, and maintain such records, as the Attorney General may require to enable the United States to meet its obligations under articles 19 and 20 of the Single Convention on Narcotic Drugs and article 16 of the Convention on Psychotropic Substances. The Attorney General shall administer the requirements of this subsection in such a manner as to avoid the unnecessary imposition of duplicative requirements under this subchapter on manufacturers subject to the requirements of this subsection.

Investigational uses of drugs; procedures

(f) Regulations under sections 355(i) and 360b(j) of this title, relating to investigational use of drugs, shall include such procedures as the Secretary, after consultation with the Attorney General, determines are necessary to insure the security and accountability of controlled substances used in research to which such regulations apply.

Change of address

(g) Every registrant under this subchapter shall be required to report any change of professional or business address in such manner as the Attorney General shall by regulation require.

(Pub.L. 91-513, Title II, § 307, Oct. 27, 1970, 84 Stat. 1258; Pub.L. 93-281, § 5, May 14, 1974, 88 Stat. 125; Pub.L. 95-633, Title I, §§ 104, 110, Nov. 10, 1978, 92 Stat. 3772, 3773; Pub.L. 98-473, Title II, §§ 514, 515, Oct. 12, 1984, 98 Stat. 2074.)

References in Text. Schedules II, III, IV, and V, referred to in subsec. (c)(1), are set out in section 812(c) of this title.

§ 828. Order forms

Unlawful distribution of controlled substances

(a) It shall be unlawful for any person to distribute a controlled substance in schedule I or II to another except in pursuance of a written order of the person to whom such substance is distributed, made on a form to be issued by the Attorney General in blank in accordance with subsection (d) of this section and regulations prescribed by him pursuant to this section.

Nonapplicability of provisions

(b) Nothing in subsection (a) of this section shall apply to—

(1) the exportation of such substances from the United States in conformity with subchapter II of this chapter;

(2) the delivery of such a substance to or by a common or contract carrier for carriage in the lawful and usual course of its business, or to or by a warehouseman for storage in the lawful and usual course of its business; but where such carriage or storage is in connection with the distribution by the owner of the substance to a third person, this paragraph shall not relieve the distributor from compliance with subsection (a) of this section.

Preservation and availability

(c)(1) Every person who in pursuance of an order required under subsection (a) of this section distributes a controlled substance shall preserve such order for a period of two years, and shall make such order available for inspection and copying by officers and employees of the United States duly authorized for that purpose by the Attorney General, and by officers or employees of States or their political subdivisions who are charged with the enforcement of State or local laws regulating the production, or regulating the distribution or dispensing, of controlled substances and who are authorized under such laws to inspect such orders.

(2) Every person who gives an order required under subsection (a) of this section shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued by the Attorney General in blank in accordance with subsection (d) of this section and regulations prescribed by him pursuant to this section, and shall, if such order is accepted, preserve such duplicate for a period of two years and make it available for inspection and copying by the officers and employees mentioned in paragraph (1) of this subsection.

Issuance

(d)(1) The Attorney General shall issue forms pursuant to subsections (a) and (c)(2) of this section only to persons validly registered under section 823 of this title (or exempted from registration under section 822(d) of this title). Whenever any such form is issued to a person, the Attorney General shall, before delivery thereof, insert therein the name of such person, and it shall be unlawful for any other person (A) to use such form for the purpose of obtaining controlled substances or (B) to furnish such form to any person with intent thereby to procure the distribution of such substances.

(2) The Attorney General may charge reasonable fees for the issuance of such forms in such amounts as he may prescribe for the purpose of covering the cost to the United States of issuing such forms, and other necessary activities in connection therewith.

Unlawful acts

(e) It shall be unlawful for any person to obtain by means of order forms issued under this section controlled substances for any purpose other than their use, distribution, dispensing, or administration in the conduct of a lawful business in such substances or in the course of his professional practice or research.

(Pub.L. 91–513, Title II, § 308, Oct. 27, 1970, 84 Stat. 1259.)

References in Text. Schedules I and II, referred to in subsec. (a), are set out in section 812(c) of this title.

Subchapter II of this chapter, referred to in subsec. (b)(1), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 829. Prescriptions

Schedule II substances

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

Schedule III and IV substances

(b) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

Schedule V substances

(c) No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

Non-prescription drugs with abuse potential

(d) Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food, Drug, and Cosmetic Act should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him all available data relevant thereto. (Pub.L. 91-513, Title II, § 309, Oct. 27, 1970, 84 Stat. 1260.)

References in Text. Schedules II, III, IV, and V, referred to in text, are set out in section 812(c) of this title.

The Federal Food, Drug, and Cosmetic Act, referred to in subsecs. (a), (b), and (d), is Act June 25, 1938, c. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (section 301 et seq.) of Title 21 U.S.C.A., Food and Drugs. Section 503(b) of that Act is classified to section 353(b) of Title 21.

§ 830. Piperidine reporting

Required information; identification of recipient or purchaser; exceptions

(a)(1) Except as provided under paragraph (3), any person who distributes, sells, or imports any piperidine shall report to the Attorney General such information, in such form and manner, and within such time period or periods (of not less than seven days), concerning the distribution, sale, or importation as the Attorney General may require by regulation, and the person shall preserve a copy of each such report for 2 years. The Attorney General may include in the information required to be reported the following:

(A) The quantity, form, and manner in which, and date on which, the piperidine was distributed, sold, or imported.

(B)(i) In the case of the distribution or sale of piperidine to an individual, the name, address, and age of the individual and the type of identification presented to confirm the identity of the individual.

(ii) In the case of the distribution or sale of piperidine to an entity other than an individual, the name and address of the entity and the name, address, and title of the individual ordering or receiving the piperidine and the type of identification presented to confirm the identity of the individual and of the entity.

(2) Except as provided under paragraph (3), no person may distribute or sell piperidine unless the recipient or purchaser presents to the distributor or seller identification of such type, to confirm the identity of the recipient or purchaser (and any entity which the recipient or purchaser represents), as the Attorney General establishes by regulation.

(3) Under such conditions and to such extent as the Attorney General establishes, paragraphs (1) and (2) shall not apply to—

(A) the distribution of piperidine between agents or employees within a single facility (as defined by the Attorney General), if such agents or employees are acting in the lawful and usual course of their business or employment;

(B) the delivery of piperidine to or by a common or contract carrier for carriage in the lawful and usual course of its business, or to or by a warehouseman for storage in the lawful and usual course of its business; but where such carriage or storage is in connection with the distribution, sale, or importation of the piperidine to a third person, this subparagraph shall not relieve the distributor, seller, or importer from compliance with paragraph (1) or (2); or

(C) any distribution, sale, or importation of piperidine with respect to which the Attorney General determines that the report required by paragraph (1) or the presentation of identification required by paragraph (2) is not necessary for the enforcement of this subchapter.

Confidential information

(b) Any information which is reported to or otherwise obtained by the Department of Justice under this section and which is exempt from disclosure pursuant to subsection (a) of section 552 of Title 5 by reason of subsection (b)(4) thereof shall be considered confidential and shall not be disclosed, except that such information may be disclosed to officers or employees of the United States concerned with carrying out this subchapter or subchapter II of this chapter or when relevant in any proceeding for the enforcement of this subchapter or subchapter II of this chapter.

Definitions

(c) For purposes of this section, section 841(d) of this title, and section 842(a)(9) of this title:

(1) The term "import" has the meaning given such term in section 951(a)(1) of this title.

(2) The term "phencyclidine" means 1-(1-phenylcyclohexyl) piperidine, its salts, or any immediate precursor, homolog, analog, or derivative (or salt thereof) of 1-(1-phenylcyclohexyl) piperidine that is included in schedule I or II of part B of this subchapter.

(3) The term "piperidine" includes its salts and acyl derivatives.

(Pub.L. 91–513, Title II, § 310, as added Pub.L. 95–633, Title II, § 202(a), Nov. 10, 1978, 92 Stat. 3774.)

References in Text. Subchapter II of this chapter referred to in subsec. (b), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1940, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

Schedules I and II, referred to in subsec. (c)(2), are set out in section 812(c) of this title.

Effective Date; Time to Submit Piperidine Report; Required Information. Section 203(a) of Pub.L. 95–633 provided that:

"(1) Except as provided under paragraph (2), the amendments may by this title [enacting this section and amending sections 841 to 843 of this title] shall take effect on the date of the enactment of this Act [Nov. 10, 1978].

"(2) Any person required to submit a report under section 310(a)(1) of the Controlled Substances Act [subsec. (a)(1) of this section] respecting a distribution, sale, or importation of piperidine during the 90 days after the date of the enactment of this Act [Nov. 10, 1978] may submit such report any time up to 97 days after such date of enactment.

"(3) Until otherwise provided by the Attorney General by regulation, the information required to be reported by a person under section 310(a)(1) of the Controlled Substances Act (as added by section 202(a)(2) of this title) [subsec. (a)(1) of this section] with respect to the person's distribution, sale, or importation of piperidine shall—

"(A) be the information described in subparagraphs (A) and (B) of such section, and

"(B) except as provided in paragraph (2) of this subsection, be reported not later than seven days after the date of such distribution, sale, or importation."

Regulations for Piperidine Reporting. Section 203(b) of Pub.L. 95–633 provided that:

"The Attorney General shall—

"(1) first publish proposed interim regulations to carry out the requirements of section 310(a) of the Controlled Substances Act (as added by section 202(a)(2) of this title) [subsec. (a) of this section] not later than 30 days after the date of the enactment of this Act [Nov. 10, 1978], and

"(2) first promulgate final interim regulations to carry out such requirements not later than 75 days after the date of the enactment of this Act [Nov. 10, 1978], such final interim regulations to be effective with respect to distributions, sales, and importations of piperidine on and after the ninety-first day after the date of the enactment of this Act."

Report to President and Congress on Effectiveness of Title II of Pub.L. 95–633. Section 203(c) of Pub.L. 95–633 required the Attorney General, after consultation with the Secretary of Health, Education, and Welfare [now Secretary of Health and Human Services], to analyze and evaluate the impact and effectiveness of the amendments made by Title II of Pub.L. 95–633 [enacting this section and amending sections 841 to 843 of this title], including the impact on the illicit manufacture and use of phencyclidine and the impact of the requirements imposed by such amendments on legitimate distributions and uses of piperidine, and, not later than Mar. 1, 1980, to report to the President and the Congress on such analysis and evaluation and to include in such report such recommendations as he deemed appropriate.

Part D—Offenses and Penalties

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD); such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both[1]

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(C) In the case of less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $50,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $100,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $10,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $20,000, or both.

(4) Notwithstanding paragraph 1(C) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1), any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be fined not more than—

(A) $500,000 if such person is an individual; and

(B) $1,000,000 if such person is not an individual.

Special parole term

(c) A special parole term imposed under this section or section 845 845a[2] of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 845a[2] of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

(Pub.L. 91–513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95–633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96–359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98–473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

[1] So in original. A period probably should be inserted.

[2] So in original. Probably should be "sections 845 or 845a".

Amendment of Section

Pub.L. 98–473, Title II, §§ 224(a), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, this section is amended:

(1) in subsection (b)(1)(B), by deleting the last sentence;

(2) in subsection (b)(1)(C), by deleting the last sentence;

(3) in subsection (b)(2), by deleting the last sentence;

(4) in subsection (b)(4), by deleting "subsections (a) and (b) of", and by adding "and section 3607 of Title 18" after "844 of this Title";

(5) in former subsection (b)(5), by deleting the last sentence; and

(6) by repealing subsection (c).

References in Text. Subchapter II of this chapter, referred to in subsec. (b)(1), (2), (3), (5), and (6), was in the original "title III", meaning of Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

Schedules I, II, III, IV, and V, referred to in subsec. (b)(1), (2), and (3), are set out in section 812(c) of this title.

§ 842. Prohibited acts B

Unlawful acts

(a) It shall be unlawful for any person—

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title;

(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

(3) who is a registrant to distribute a controlled substance in violation of section 825 of this title;

(4) to remove, alter, or obliterate a symbol or label required by section 825 of this title;

(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II of this chapter;

(6) to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II of this chapter;

(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 824(f) or 881 of this title or to remove or dispose of substances so placed under seal;

(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this subchapter or subchapter II of this chapter, any information acquired in the course of an inspection authorized by this subchapter concerning any method or process which as a trade secret is entitled to protection; or

(9) to distribute or sell piperidine in violation of regulations established under section 830(a)(2) of this title, respecting presentation of identification.

Manufacture

(b) It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is—

(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 826 of this title; or

(2) in excess of a quota assigned to him pursuant to section 826 of this title.

Penalties

(c)(1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of Title 28 to enforce this paragraph.

(2)(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of $50,000, or both.

(C) Subparagraphs (A) and (B) shall not apply to a violation of subsection (a)(5) of this section with respect to a refusal or failure to make a report required under section 830(a) of this title (relating to piperidine reporting).

(3) Except under the conditions specified in paragraph (2) of this subsection, a violation of this section does not constitute a crime, and a judgment for the United States and imposition of a civil penalty pursuant to paragraph (1) shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

(Pub.L. 91–513, Title II, § 402, Oct. 27, 1970, 84 Stat. 1262; Pub.L. 95–633, Title II, § 202(b)(1), (2), Nov. 10, 1978, 92 Stat. 3776.)

References in Text. Subchapter II of this chapter, referred to in subsecs. (a)(5), (6), (8), and (c)(2)(B), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A Tables volume.

Schedules I and II, referred to in subsec. (b), are set out in section 812(c), of this title.

§ 843. Prohibited acts C

Unlawful acts

(a) It shall be unlawful for any person knowingly or intentionally—

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title;

(2) to use in the course of the manufacture, distribution, or dispensing of a controlled substance, or to use for the purpose of acquiring or obtaining a controlled substance, a registration number which is fictitious, revoked, suspended, expired, or issued to another person.

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4)(A) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter, or (B) to present false or fraudulent identification where the person is receiving or purchasing piperidine and the person is required to present identification under section 830(a) of this title; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and in-

cludes mail, telephone, wire, radio, and all other means of communication.

Penalties

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

(Pub.L. 91–513, Title II, § 403, Oct. 27, 1970, 84 Stat. 1263; Pub.L. 95–633, Title II, § 202(b)(3), Nov. 10, 1978, 92 Stat. 3776; Pub.L. 98–473, Title II, § 516, Oct. 12, 1984, 98 Stat. 2074.)

References in Text. Schedules I and II, referred to in subsec. (a)(1), are set out in section 812(c) of this title.

Subchapter II of this chapter, referred to in subsecs. (a)(4)(A), (b), and (c), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 844. Penalty for simple possession; conditional discharge and expunging of records for first offense

(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(b)(1) If any person who has not previously been convicted of violating subsection (a) of this section, any other provision of this subchapter or subchapter II of this chapter, or any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the Department of Justice solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under this part for second or subsequent convictions) or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

(2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person, if he was not over twenty-one years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained by the Department of Justice under paragraph (1)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over twenty-one years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(Pub.L. 91–513, Title II, § 404, Oct. 27, 1970, 84 Stat. 1264.)

Amendment of Section

Pub. L. 98–473, Title II, §§ 219, 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is amended, effective Nov. 1, 1986, by striking out subsec. (b) and by deleting the designation "(a)" in subsec. (a).

References in Text. Subchapter II of this chapter, referred to in subsecs. (a) and (b)(1), was in the original "title III", meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 845. Distribution to persons under age twenty-one

(a) Except as provided in section 845a, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule.

(b) Except as provided in section 845a, any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age after a prior conviction or convictions under subsection (a) of this section (or under section 333(b) of this title as in effect prior to May 1, 1971) have become final, is punishable by (1) a term of imprisonment, or a fine, or both, up to three times that authorized by section 841(b) of this title, and (2) at least three times any special parole term authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule.

(Pub. L. 91–513, Title II, § 405, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 98–473, Title II, § 503(b)(3), Oct. 12, 1984, 98 Stat. 2070.)

Amendment of Section

Pub. L. 98–473, Title II, §§ 224(b), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, this section is amended:

(1) in subsection (a), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule"; and

(2) in subsection (b), by deleting "(1)" the second place it appears, and by deleting ", and (2) at least three times any special parole term authorized by section 841(b) of this title, for a second or subsequent offense involving the same controlled substance and schedule".

§ 845a. Distribution in or near schools

Penalty

(a) Any person who violates section 841(a)(1) of this title by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school is (except as provided in subsection (b) of this section) punishable (1) by a term of imprisonment, or fine, or both up to twice that authorized by section 841(b) of this title; and (2) at least twice any special parole term authorized by section 841(b) of this title for a first offense involving the same controlled substance and schedule.

Second offenders

(b) Any person who violates section 841(a)(1) of this title by distributing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary school after a prior conviction or convictions under subsection (a) of this section have become final is punishable (1) by a term of imprisonment of not less than three years and not more than life imprisonment and (2) at least three times any special term authorized by section 841(b) of this title for a second or subsequent offense involving the same controlled substance and schedule.

Suspension of sentence; probation; parole

(c) In the case of any sentence imposed under subsection (b) of this section, imposition or execution of such sentence shall not be suspended and probation shall not be granted. An individual convicted under subsection (b) of this section shall not be eligible for parole under section 4202 of Title 18 until the individual has served the minimum sentence required by such subsection.

(Pub. L. 91–513, Title II, § 405A, as added Pub. L. 98–473, Title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069.)

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91–513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.)

§ 847. Additional penalties

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of,

any civil or administrative penalty or sanction authorized by law.

(Pub. L. 91-513, Title II, § 407, Oct. 27, 1970, 84 Stat. 1265.)

§ 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in section 853 of this title.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

(Pub. L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 98-473, Title II, § 305, Oct. 12, 1984, 98 Stat. 2030, 2050.)

Amendment of Section

Pub. L. 98-473, Title II, §§ 224(c), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, subsec. (c) of this section is amended by deleting "and section 4202 of Title 18".

References in Text. Subchapter II of this chapter, referred to in subsec. (b), was in the original "title III", meaning Title III of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

The Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), referred to in subsec. (c), is not classified to the U.S.C.A.

§ 849. Dangerous special drug offender sentencing

Notice to court by United States attorney

(a) Whenever a United States attorney charged with the prosecution of a defendant in a court of the United States for an alleged felonious violation of any provision of this subchapter or subchapter II of this chapter committed when the defendant was over the age of twenty-one years has reasons to believe that the defendant is a dangerous special drug offender such United States attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special drug offender who upon conviction for such felonious violation is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special drug offender. In no case shall the fact that the defendant is alleged to be a dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special drug offender and his counsel.

Hearing; inspection of presentence report; counsel; process; examination of witnesses; penalty; sentence

(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felonious violation, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the

defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felonious violation and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felonious violation. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felonious violation. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

Sentences for life or for term exceeding twenty-five years

(c) This section shall not prevent the imposition and execution of a sentence of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

Mandatory minimum penalties

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special drug offender to less than any mandatory minimum penalty prescribed by law for such felonious violation. This section shall not be construed as creating any mandatory minimum penalty.

Special drug offender defined

(e) A defendant is a special drug offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States or a State or any political subdivision thereof for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation, and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation, and less than five years have elapsed between the commission of such felonious violation and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision thereof; or

(2) the defendant committed such felonious violation as part of a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felonious violation was, or the defendant committed such felonious violation in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing, or give or receive a bribe or use force in connection with such dealing.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such dealing. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, without reference to exceptions, under section 206(a)(1) of Title 29 for an employee engaged in commerce or in the production of goods for com-

merce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of Title 26. For purposes of paragraph (2) of this subsection, special skill or expertise in such dealing includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of such dealing, the enlistment of accomplices in such dealing, the escape from detection or apprehension for such dealing, or the disposition of the fruits or proceeds of such dealing. For purposes of paragraphs (2) and (3) of this subsection, such dealing forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Dangerous defendants

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felonious violation is required for the protection of the public from further criminal conduct by the defendant.

Appeal

(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

Review of sentence

(h) With respect to the imposition, correction, or reduction of a sentence after proceedings under this section, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without notion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of the sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of the abuse of the right of the United States to take such review.

(Pub. L. 91–513, Title II, § 409, Oct. 27, 1970, 84 Stat. 1266.)

Repeal of Section

Pub. L. 98–473, Title II, §§ 219(a), 235, Oct. 12, 1984, 98 Stat. 2027, 2031, provided that this section is repealed effective Nov. 1, 1986.

References in Text. Subchapter II of this chapter, referred to in subsec. (a), was in the original "title III", meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 850. Information for sentencing

Except as otherwise provided in this subchapter or section 242a(a) of Title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.

(Pub. L. 91–513, Title II, § 410, Oct. 27, 1970, 84 Stat. 1269.)

References in Text. Subchapter II of this chapter, referred to in text, was in the original "title III", meaning Title III of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 851. Proceedings to establish prior convictions

Information filed by United States attorney

(a)(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

Affirmation or denial of previous conviction

(b) If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

Denial; written response; hearing

(c)(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Imposition of sentence

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

Statute of limitations

(e) No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

(Pub. L. 91-513, Title II, § 411, Oct. 27, 1970, 84 Stat. 1269.)

§ 852. Application of treaties and other international agreements

Nothing in the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances, or other treaties or international agreements shall be construed to limit the provision of treatment, education, or rehabilitation as alternatives to conviction or criminal penalty for offenses involving any drug or other substance subject to control under any such treaty or agreement.

(Pub. L. 91–513, Title II, § 412, as added Pub. L. 95–633, Title I, § 107(a), Nov. 10, 1978, 92 Stat. 3773.)

§ 853. Criminal forfeitures

Property subject to criminal forfeiture

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Meaning of term "property"

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

Third party transfers

(c) All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Rebuttable presumption

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter III of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter III of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter III of this chapter.

Protective orders

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

Warrant of seizure

(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

Execution

(g) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

Disposition of property

(h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

Authority of Attorney General

(i) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

Applicability of civil forfeiture provisions

(j) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title (21 U.S.C. 881(d)) shall apply to a criminal forfeiture under this section.

Bar on intervention

(k) Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

Jurisdiction to enter orders

(*l*) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

Depositions

(m) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

Third party interests

(n)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the

period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

Construction of section

(o) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(Pub. L. 91–513, Title II, § 413 as added and amended Pub. L. 98–473, Title II, §§ 303, 2301(d)–(f), Oct. 12, 1984, 98 Stat. 2044, 2193.)

§ 854. Investment of illicit drug profits

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year in which such person has participated as a principal within the meaning of section 2 of Title 18 to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this section if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any violation of this subchapter or subchapter II of this chapter after such purchase do not amount in the aggregate to 1 per centum of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) Whoever violates this section shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(c) As used in this section, the term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(d) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(Pub. L. 91–513, Title II, § 414, as added Pub. L. 98–473, Title II, § 303, Oct. 12, 1984, 98 Stat. 2049.)

§ 855. Alternative fine

In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(Pub. L. 91–513, Title II, § 415, as added Pub. L. 98–473, Title II, § 2302, Oct. 12, 1984, 98 Stat. 2193.)

Part E—Administrative and Enforcement Provisions

§ 871. Attorney General

Delegation of functions

(a) The Attorney General may delegate any of his functions under this subchapter to any officer or employee of the Department of Justice.

Rules and regulations

(b) The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.

Acceptance of devises, bequests, gifts, and donations

(c) The Attorney General may accept in the name of the Department of Justice any form of devise, bequest, gift, or donation where the donor intends to donate property for the purpose of preventing or controlling the abuse of controlled substances. He may take all appropriate steps to secure possession of such property and may sell, assign, transfer, or convey any such property other than moneys.

(Pub. L. 91–513, Title II, § 501, Oct. 27, 1970, 84 Stat. 1270.)

§ 872. Education and research programs of Attorney General

Authorization

(a) The Attorney General is authorized to carry out educational and research programs directly related to enforcement of the laws under his jurisdiction concerning drugs or other substances which are or may be subject to control under this subchapter. Such programs may include—

(1) educational and training programs on drug abuse and controlled substances law enforcement for local, State, and Federal personnel;

(2) studies or special projects designed to compare the deterrent effects of various enforcement strategies on drug use and abuse;

(3) studies or special projects designed to assess and detect accurately the presence in the human body of drugs or other substances which are or may be subject to control under this subchapter, including the development of rapid field identification methods which would enable agents to detect microquantities of such drugs or other substances;

(4) studies or special projects designed to evaluate the nature and sources of the supply of illegal drugs throughout the country;

(5) studies or special projects to develop more effective methods to prevent diversion of controlled substances into illegal channels; and

(6) studies or special projects to develop information necessary to carry out his functions under section 811 of this title.

Contracts

(b) The Attorney General may enter into contracts for such educational and research activities without performance bonds and without regard to section 5 of Title 41.

Identification of research populations; authorization to withhold

(c) The Attorney General may authorize persons engaged in research to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

Effect of treaties and other international agreements on confidentiality

(d) Nothing in the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances, or other treaties or international agreements shall be construed to limit, modify, or prevent the protection of the confidentiality of patient records or of the names and other identifying characteristics of research subjects as provided by any Federal, State, or local law or regulation.

Use of controlled substances in research

(e) The Attorney General, on his own motion or at the request of the Secretary, may authorize the possession, distribution, and dispensing of controlled substances by persons engaged in research. Persons who obtain this authorization shall be exempt from State or Federal prosecution for possession, distribution, and dispensing of controlled substances to the extent authorized by the Attorney General.

(Pub. L. 91-513, Title II, § 502, Oct. 27, 1970, 84 Stat. 1271; Pub. L. 95-633, Title I, § 108(a), Nov. 10, 1978, 92 Stat. 3773.)

§ 873. Cooperative arrangements

Powers of Attorney General

(a) The Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he is authorized to—

(1) arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances;

(2) cooperate in the institution and prosecution of cases in the courts of the United States and before the licensing boards and courts of the several States;

(3) conduct training programs on controlled substance law enforcement for local, State, and Federal personnel;

(4) maintain in the Department of Justice a unit which will accept, catalog, file, and otherwise utilize all information and statistics, including records of controlled substance abusers and other controlled substance law offenders, which may be received from Federal, State, and local agencies, and make such information available for Federal, State, and local law enforcement purposes;

(5) conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted; and

(6) assist State and local governments in suppressing the diversion of controlled substances from legitimate medical, scientific, and commercial channels by—

(A) making periodic assessments of the capabilities of State and local governments to adequately control the diversion of controlled substances;

(B) providing advice and counsel to State and local governments on the methods by which such governments may strengthen their controls against diversion; and

(C) establishing cooperative investigative efforts to control diversion.

Assistance from Federal agencies; confidential information

(b) When requested by the Attorney General, it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance, including technical advice, to him for carrying out his functions under this subchapter; except that no such agency or instrumentality shall be required to furnish the name of, or other identifying information about, a patient or research subject whose identity it has undertaken to keep confidential.

Controlled substance with highest rate of abuse; reports to State agencies

(c) The Attorney General shall annually (1) select the controlled substance (or controlled substances)

contained in schedule II which, in the Attorney General's discretion, is determined to have the highest rate of abuse, and (2) prepare and make available to regulatory, licensing, and law enforcement agencies of States descriptive and analytic reports on the actual distribution patterns in such States of each such controlled substance.

(d)(1) The Attorney General may make grants, in accordance with paragraph (2), to State and local governments to assist in meeting the costs of—

(A) collecting and analyzing data on the diversion of controlled substances,

(B) conducting investigations and prosecutions of such diversions,

(C) improving regulatory controls and other authorities to control such diversions,

(D) programs to prevent such diversions,

(E) preventing and detecting forged prescriptions, and

(F) training law enforcement and regulatory personnel to improve the control of such diversions.

(2) No grant may be made under paragraph (1) unless an application therefor is submitted to the Attorney General in such form and manner as the Attorney General may prescribe. No grant may exceed 80 per centum of the costs for which the grant is made, and no grant may be made unless the recipient of the grant provides assurances satisfactory to the Attorney General that it will obligate funds to meet the remaining 20 per centum of such costs. The Attorney General shall review the activities carried out with grants under paragraph (1) and shall report annually to Congress on such activities.

(3) To carry out this subsection there is authorized to be appropriated $6,000,000 for fiscal year 1985 and $6,000,000 for fiscal year 1986.

(Pub. L. 91–513, Title II, § 503, Oct. 27, 1970, 84 Stat. 1271; Pub. L. 96–359, § 8(a), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98–473, Title II, § 517, Oct. 12, 1984, 98 Stat. 2074.)

§ 874. Advisory committees

The Attorney General may from time to time appoint committees to advise him with respect to preventing and controlling the abuse of controlled substances. Members of the committees may be entitled to receive compensation at the rate of $100 for each day (including traveltime) during which they are engaged in the actual performance of duties. While traveling on official business in the performance of duties for the committees, members of the committees shall be allowed expenses of travel, including per diem instead of subsistence, in accordance with subchapter I of chapter 57 of Title 5.

(Pub. L. 91–513, Title II, § 504, Oct. 27, 1970, 84 Stat. 1272.)

Termination of Advisory Committees. Advisory committees in existence on Jan. 5, 1973, to terminate not later than the expiration of two year period following Jan. 5, 1973, and advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of two year period beginning on the date of their establishment, unless in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two year period, or in the case of a committee established by Congress, its duration is otherwise provided by law, see section 14 of Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, U.S.C.A., Government Organization and Employees.

§ 875. Administrative hearings

(a) In carrying out his functions under this subchapter, the Attorney General may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States.

(b) Except as otherwise provided in this subchapter, notice shall be given and hearings shall be conducted under appropriate procedures of subchapter II of chapter 5 of Title 5.

(Pub. L. 91–513, Title II, § 505, Oct. 27, 1970, 84 Stat. 1272.)

§ 876. Subpenas

Authorization of use by Attorney General

(a) In any investigation relating to his functions under this subchapter with respect to controlled substances, the Attorney General may subpena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing; except that a witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

Service

(b) A subpena issued under this section may be served by any person designated in the subpena to

serve it. Service upon a natural person may be made by personal delivery of the subpena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpena entered on a true copy thereof by the person serving it shall be proof of service.

Enforcement

(c) In the case of contumacy by or refusal to obey a subpena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpena. The court may issue an order requiring the subpenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

(Pub. L. 91–513, Title II, § 506, Oct. 27, 1970, 84 Stat. 1272.)

§ 877. Judicial review

All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

(Pub. L. 91–513, Title II, § 507, Oct. 27, 1970, 84 Stat. 1273.)

§ 878. Powers of enforcement personnel

Any officer or employee of the Drug Enforcement Administration designated by the Attorney General may—

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

(Pub. L. 91–513, Title II, § 508, Oct. 27, 1970, 84 Stat. 1273; Pub. L. 96–132, § 16(b), Nov. 30, 1979, 93 Stat. 1049.)

§ 879. Search warrants

A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

(Pub. L. 91–513, Title II, § 509, Oct. 27, 1970, 84 Stat. 1274; Pub. L. 93–481, § 3, Oct. 26, 1974, 88 Stat. 1455.)

§ 880. Administrative inspections and warrants

Controlled premises defined

(a) As used in this section, the term "controlled premises" means—

(1) places where original or other records or documents required under this subchapter are kept or required to be kept, and

(2) places, including factories, warehouses, or other establishments, and conveyances, where persons registered under section 823 of this title (or exempted from registration under section 822(d) of this title) may lawfully hold, manufacture, or distribute, dispense, administer, or otherwise dispose of controlled substances.

Grant of authority; scope of inspections

(b)(1) For the purpose of inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept or made under this subchapter and otherwise facilitating the carrying out of his functions under this subchapter, the Attorney General is authorized, in accordance with this section, to enter controlled premises and to conduct administrative inspections thereof, and of the things specified in this section, relevant to those functions.

(2) Such entries and inspections shall be carried out through officers or employees (hereinafter referred to as "inspectors") designated by the Attorney General. Any such inspector, upon stating his purpose and presenting to the owner, operator, or agent in charge of such premises (A) appropriate credentials and (B) a written notice of his inspection authority (which notice in the case of an inspection requiring, or in fact supported by, an administrative inspection warrant shall consist of such warrant), shall have the right to enter such premises and conduct such inspection at reasonable times.

(3) Except as may otherwise be indicated in an applicable inspection warrant, the inspector shall have the right—

(A) to inspect and copy records, reports, and other documents required to be kept or made under this subchapter;

(B) to inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished drugs and other substances or materials, containers, and labeling found therein, and, except as provided in paragraph (5) [1] of this subsection, all other things therein (including records, files, papers, processes, controls, and facilities) appropriate for verification of the records, reports, and documents referred to in clause (A) or otherwise bearing on the provisions of this subchapter; and

(C) to inventory any stock of any controlled substance therein and obtain samples of any such substance.

(4) Except when the owner, operator, or agent in charge of the controlled premises so consents in writing, no inspection authorized by this section shall extend to—

(A) financial data;

(B) sales data other than shipment data; or

(C) pricing data.

Situations not requiring warrants

(c) A warrant under this section shall not be required for the inspection of books and records pursuant to an administrative subpena issued in accordance with section 876 of this title, nor for entries and administrative inspections (including seizures of property)—

(1) with the consent of the owner, operator, or agent in charge of the controlled premises;

(2) in situations presenting imminent danger to health or safety;

(3) in situations involving inspection of conveyances where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;

(4) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or

(5) in any other situations where a warrant is not constitutionally required.

Administrative inspection warrants; issuance; execution; probable cause

(d) Issuance and execution of administrative inspection warrants shall be as follows:

(1) Any judge of the United States or of a State court of record, or any United States magistrate, may, within his territorial jurisdiction, and upon proper oath or affirmation showing probable cause, issue warrants for the purpose of conducting administrative inspections authorized by this subchapter or regulations thereunder, and seizures of property appropriate to such inspections. For the purposes of this section, the term "probable cause" means a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant.

(2) A warrant shall issue only upon an affidavit of an officer or employee having knowledge of the facts alleged, sworn to before the judge or magistrate and establishing the grounds for issuing the warrant. If the judge or magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be inspected, the purpose of such inspection, and, where appropriate, the type of property to be inspected, if any. The warrant shall identify the items or types of property to be seized, if any. The warrant shall be directed to a person authorized under subsection (b)(2) of this section to execute it. The warrant shall state the grounds for its issuance and the name of the person or persons whose affidavit has been taken in support thereof. It shall command the person to whom it is directed to inspect the area, premises, building, or conveyance identified for the purpose specified, and, where appropriate, shall direct the seizure of the property specified. The warrant shall direct that it be served during normal business hours. It shall designate the judge or magistrate to whom it shall be returned.

(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate allows additional time in the warrant. If property is seized pursuant to a warrant, the person execu-

ting the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) The judge or magistrate who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made.

(Pub. L. 91–513, Title II, § 510, Oct. 27, 1970, 84 Stat. 1274.)

[1] So in original. Probably should be "paragraph (4)".

§ 881. Forfeitures

Property subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims

(b) Any property subject to civil or criminal forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil or criminal forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of forfeited property

(e) Whenever property is civilly or criminally forfeited or under this subchapter the Attorney General may—

(1) retain the property for official use or transfer the custody or ownership of any forfeited property to any Federal, State, or local agency pursuant to section 616 of Title 19;

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(3) require that the General Services Administration take custody of the property and dispose of it in accordance with law; or

(4) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

The Attorney General shall ensure the equitable transfer pursuant to paragraph (1) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General pursuant to paragraph (1) shall not be subject to review. The proceeds from any sale under paragraph (2) and any moneys forfeited under this subchapter shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28 any amounts of such moneys and proceeds remaining after payment of such expenses.

Forfeiture of schedule I substances

(f) All controlled substances in schedule I that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

Plants

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild

growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(Pub. L. 91–513, Title II, § 511, Oct. 27, 1970, 84 Stat. 1276; Pub. L. 95–633, Title III, § 301(a), Nov. 10, 1978, 92 Stat. 3777; Pub. L. 96–132, § 14, Nov. 30, 1979, 93 Stat. 1048; Pub.L. 98–473, Title II, §§ 306, 309, 518, Oct. 12, 1984, 98 Stat. 2050, 2051, 2075.)

References in Text. Subchapter II of this chapter, referred to in subsec. (a)(4)(A), was in the original "title III", meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III compromises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

The criminal laws of the United States, referred to in subsec. (a)(4)(B), are classified generally to Title 18, U.S.C.A., Crimes and Criminal Procedure, set out Ante.

The Supplemental Rules for Certain Admiralty and Maritime Claims, referred to in subsec. (b), are set out in Title 28, U.S.C.A., Judiciary and Judicial Procedure, and Federal Rules of Civil Procedure pamphlet, 1982 ed.

The customs laws, referred to in subsec. (d), are classified generally to Title 19, U.S.C.A., Customs Duties.

Schedules I and II, referred to in subsecs. (f) and (g)(1), are set out in section 812(c) of this title.

Codification. "Drug Enforcement Administration" was substituted for "Bureau of Narcotics and Dangerous Drugs" in subsec. (e)(4) to conform to congressional intent manifest in amendment of section 802(4) of this title by Pub. L. 96–132, § 16(a), Nov. 30, 1979, 93 Stat. 1049, now defining term "Drug Enforcement Administration" as used in this subchapter.

§ 882. Injunctions

(a) The district courts of the United States and all courts exercising general jurisdiction in the territories and possessions of the United States shall have jurisdiction in proceedings in accordance with the Federal Rules of Civil Procedure to enjoin violations of this subchapter.

(b) In case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury in accordance with the Federal Rules of Civil Procedure.

(Pub. L. 91–513, Title II, § 512, Oct. 27, 1970, 84 Stat. 1278.)

References in Text. The Federal Rules of Civil Procedure, referred to in text, are set out in Title 28, U.S.C.A., Judiciary and Judicial Procedure, and Federal Rules of Civil Procedure pamphlet, 1982 ed.

§ 883. Enforcement proceedings

Before any violation of this subchapter is reported by the Administrator of the Drug Enforcement Administration to any United States attorney for institution of a criminal proceeding, the Administrator may require that the person against whom such proceeding is contemplated be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

(Pub. L. 91–513, Title II, § 513, Oct. 27, 1970, 84 Stat. 1278; Pub. L. 96–132, § 16(c), Nov. 30, 1979, 93 Stat. 1049.)

§ 884. Immunity and privilege

Refusal to testify

(a) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before a court or grand jury of the United States, involving a violation of this subchapter, and the person presiding over the proceeding communicates to the witness an order issued under this section, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. But no testimony or other information compelled under the order issued under subsection (b) of this section or any information obtained by the exploitation of such testimony or other information, may be used against the witness in any criminal case, including any criminal case brought in a court of a State, except a prosecution for perjury, giving a

false statement, or otherwise failing to comply with the order.

Order of United States district court

(b) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before a court or grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, upon the request of the United States attorney for such district, an order requiring such individual to give any testimony or provide any other information which he refuses to give or provide on the basis of his privilege against self-incrimination.

Request by United States attorney

(c) A United States attorney may, with the approval of the Attorney General or the Deputy Attorney General, or any Assistant Attorney General designated by the Attorney General, request an order under subsection (b) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Pub. L. 91-513, Title II, § 514, Oct. 27, 1970, 84 Stat. 1278.)

§ 885. Burden of proof; liabilities

Exemptions and exceptions; presumption in simple possession offenses

(a)(1) It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

(2) In the case of a person charged under section 844(a) of this title with the possession of a controlled substance, any label identifying such substance for purposes of section 353(b)(2) of this title shall be admissible in evidence and shall be prima facie evidence that such substance was obtained pursuant to a valid prescription from a practitioner while acting in the course of his professional practice.

Registration and order forms

(b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this subchapter, he shall be presumed not to be the holder of such registration or form, and the burden of going forward with the evidence with respect to such registration or form shall be upon him.

Use of vehicles, vessels, and aircraft

(c) The burden of going forward with the evidence to establish that a vehicle, vessel, or aircraft used in connection with controlled substances in schedule I was used in accordance with the provisions of this subchapter shall be on the persons engaged in such use.

Immunity of Federal, State, local and other officials

(d) Except as provided in sections 2234 and 2235 of Title 18, no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

(Pub.L. 91-513, Title II, § 515, Oct. 27, 1970, 84 Stat. 1279.)

References in Text. Schedule I, referred to in subsec. (c), is set out in section 812(c) of this title.

§ 886. Payments and advances

Payment to informers

(a) The Attorney General is authorized to pay any person, from funds appropriated for the Drug Enforcement Administration, for information concerning a violation of this subchapter, such sum or sums of money as he may deem appropriate, without reference to any moieties or rewards to which such person may otherwise be entitled by law.

Reimbursement for purchase of controlled substances

(b) Moneys expended from appropriations of the Drug Enforcement Administration for purchase of controlled substances and subsequently recovered shall be reimbursed to the current appropriation for the Administration.

Advance of funds for enforcement purposes

(c) The Attorney General is authorized to direct the advance of funds by the Treasury Department

in connection with the enforcement of this subchapter.

(Pub.L. 91–513, Title II, § 516, Oct. 27, 1970, 84 Stat. 1279; Pub.L. 96–132, § 16(b), Nov. 30, 1979, 93 Stat. 1049.)

Codification. "Administration" was substituted for "Bureau" in subsec. (b) as the probable intent of Congress in view of amendment by Pub.L. 96–132, which substituted "Drug Enforcement Administration" for "Bureau of Narcotics and Dangerous Drugs" in subsecs. (a) and (b).

PART F—GENERAL PROVISIONS

§ 901. Severability of provisions

If a provision of this chapter is held invalid, all valid provisions that are severable shall remain in effect. If a provision of this chapter is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications that are severable.

(Pub.L. 91–513, Title II, § 706, Oct. 27, 1970, 84 Stat. 1284.)

References in Text. This chapter, referred to in text, was, in the original, this Act, meaning Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1236, the Comprehensive Drug Abuse Prevention and Control Act of 1970.

§ 902. Savings provisions

Nothing in this chapter, except this part and, to the extent of any inconsistency, sections 827(e) and 829 of this title, shall be construed as in any way affecting, modifying, repealing, or superseding the provisions of the Federal Food, Drug, and Cosmetic Act.

(Pub.L. 91–513, Title II, § 707, Oct. 27, 1970, 84 Stat. 1284.)

References in Text. This chapter, referred to in text, was, in the original, this Act, meaning Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1236, the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The Federal Food, Drug, and Cosmetic Act, referred to in text, is Act June 25, 1938, c. 675, 52 Stat. 1040, which is classified generally to chapter 9 (section 301 et seq.) of Title 21, U.S.C.A., Food and Drugs.

§ 903. Application of State law

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

(Pub.L. 91–513, Title II, § 708, Oct. 27, 1970, 84 Stat. 1284.)

§ 904. Payment of tort claims

Notwithstanding section 2680(k) of Title 28, the Attorney General, in carrying out the functions of the Department of Justice under this subchapter, is authorized to pay tort claims in the manner authorized by section 2672 of Title 28, when such claims arise in a foreign country in connection with the operations of the Drug Enforcement Administration abroad.

(Pub.L. 91–513, Title II, § 709, Oct. 27, 1970, 84 Stat. 1284; Pub.L. 93–481, § 1, Oct. 26, 1974, 88 Stat. 1455; Pub.L. 95–137, § 1(a), Oct. 18, 1977, 91 Stat. 1169; Pub.L. 96–132, §§ 13, 15, Nov. 30, 1979, 93 Stat. 1048; Pub.L. 97–414, § 9(g)(1), Jan. 4, 1983, 96 Stat. 2064.)

SUBCHAPTER II—IMPORT AND EXPORT

§ 951. Definitions

(a) For purposes of this subchapter—

(1) The term "import" means, with respect to any article, any bringing in or introduction of such article into any area (whether or not such bringing in or introduction constitutes an importation within the meaning of the tariff laws of the United States).

(2) The term "customs territory of the United States" has the meaning assigned to such term by general headnote 2 to the Tariff Schedules of the United States.

(b) Each term defined in section 802 of this title shall have the same meaning for purposes of this subchapter as such term has for purposes of subchapter I of this chapter.

(Pub.L. 91–513, Title III, § 1001, Oct. 27, 1970, 84 Stat. 1285.)

References in Text. This subchapter, referred to in subsec. (b), was in the original "this title" meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1101 to 1105 of Pub.L. 91–513, see U.S.C.A. Tables volume.

Short Title. Section 1000 of Pub.L. 91–513 provided that: "This title [enacting this subchapter, amending sections 198a and 162 of Title 21, U.S.C.A., Food and Drugs, and following U.S.C.A. titles: section 4251 of Title 18, Crimes and Criminal Procedure, section 1584 of Title 19, Customs Duties, sections 4901, 4905, 6808, 7012, 7103, 7326, 7607, 7609, 7641, 7651, and 7655 of Title 26, Internal Revenue Code, section 2901 of Title 28, Judiciary and Judicial Procedure, sections 529d, 529e, and 529f of Title 31, Money and Finance, section 304m of Title 40, Public Buildings, Property, and Works, section 3411 of Title 42, The Public Health and Welfare, section 239a of Title 46, Shipping, and section 787 of Title 49, Transportation, repealing sections 171 to 174, 176 to 185, 188 to 188n, 191 to 193, 197, 198, 199, and 501 to 517 of Title 21, sections 1401 to 1407, and 3616 of Title 18, sections 4701 to 4707, 4711 to 4716, 4721 to 4726, 4731 to 4736, 4741 to 4746,

4751 to 4757, 4761, 4762, 4771 to 4776, 7237, 7238, and 7491 of Title 26, sections 529a and 529g of Title 31, section 1421m of Title 48, Territories and Insular Possessions, and enacting provisions set out as notes under this section and sections 171 and 957 of this title] may be cited as the 'Controlled Substances Import and Export Act'."

§ 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification, or declaration, or in the case of any nonnarcotic controlled substance in schedule III, such import permit, notification, or declaration, as the Attorney General may by regulation prescribe, except that if a nonnarcotic controlled substance in schedule IV or V is also listed in schedule I or II of the Convention on Psychotropic Substances it shall be imported pursuant to such import permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.

Coca leaves

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

(Pub.L. 91-513, Title III, § 1002, Oct. 27, 1970, 84 Stat. 1285; Pub.L. 95-633, Title I, § 105, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 519-521, Oct. 12, 1984, 98 Stat. 2075.)

References in Text. Schedules I, II, III, IV, and V of subchapter I of this chapter, referred to in subsecs. (a) and (b), are set out in section 812(c) of this title.

§ 953. Exportation of controlled substances

Narcotic drugs in schedules I, II, III, or IV

(a) It shall be unlawful to export from the United States any narcotic drug in schedule I, II, III, or IV unless—

(1) it is exported to a country which is a party to—

(A) the International Opium Convention of 1912 for the Suppression of the Abuses of Opium, Morphine, Cocaine, and Derivative Drugs, or to the International Opium Convention signed at Geneva on February 19, 1925; or

(B) the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs concluded at Geneva, July 13, 1931, as amended by the protocol signed at Lake Success on December 11, 1946, and the protocol bringing under international control drugs outside the scope of the convention of July 13, 1931, for limiting the manufacture and regulating the distribution of narcotic drugs

(as amended by the protocol signed at Lake Success on December 11, 1946), signed at Paris, November 19, 1948; or

(C) the Single Convention on Narcotic Drugs, 1961, signed at New York, March 30, 1961;

(2) such country has instituted and maintains, in conformity with the conventions to which it is a party, a system for the control of imports of narcotic drugs which the Attorney General deems adequate;

(3) the narcotic drug is consigned to a holder of such permits or licenses as may be required under the laws of the country of import, and a permit or license to import such drug has been issued by the country of import;

(4) substantial evidence is furnished to the Attorney General by the exporter that (A) the narcotic drug is to be applied exclusively to medical or scientific uses within the country of import, and (B) there is an actual need for the narcotic drug for medical or scientific uses within such country; and

(5) a permit to export the narcotic drug in each instance has been issued by the Attorney General.

Exception for exportation for special scientific purposes

(b) Notwithstanding subsection (a) of this section, the Attorney General may authorize any narcotic drug (including crude opium and coca leaves) in schedule I, II, III, or IV to be exported from the United States to a country which is a party to any of the international instruments mentioned in subsection (a) of this section if the particular drug is to be applied to a special scientific purpose in the country of destination and the authorities of such country will permit the importation of the particular drug for such purpose.

Nonnarcotic controlled substances in schedule I or II

(c) It shall be unlawful to export from the United States any nonnarcotic controlled substance in schedule I or II unless—

(1) it is exported to a country which has instituted and maintains a system which the Attorney General deems adequate for the control of imports of such substances;

(2) the controlled substance is consigned to a holder of such permits or licenses as may be required under the laws of the country of import;

(3) substantial evidence is furnished to the Attorney General that (A) the controlled substance is to be applied exclusively to medical, scientific, or other legitimate uses within the country to which exported, (B) it will not be exported from such country, and (C) there is an actual need for the controlled substance for medical, scientific, or other legitimate uses within the country; and

(4) a permit to export the controlled substance in each instance has been issued by the Attorney General.

Exception for exportation for special scientific purposes

(d) Notwithstanding subsection (c) of this section, the Attorney General may authorize any nonnarcotic controlled substance in schedule I or II to be exported from the United States if the particular substance is to be applied to a special scientific purpose in the country of destination and the authorities of such country will permit the importation of the particular drug for such purpose.

Nonnarcotic controlled substances in schedule III or IV; controlled substances in schedule V

(e) It shall be unlawful to export from the United States to any other country any nonnarcotic controlled substance in schedule III or IV or any controlled substances in schedule V unless—

(1) there is furnished (before export) to the Attorney General documentary proof that importation is not contrary to the laws or regulations of the country of destination for consumption for medical, scientific, or other legitimate purposes;

(2) it is exported pursuant to such notification or declaration, or in the case of any nonnarcotic controlled substance in schedule III, such export permit, notification, or declaration as the Attorney General may by regulation prescribe; and

(3) in the case of a nonnarcotic controlled substance in schedule IV or V which is also listed in schedule I or II of the Convention on Psychotropic Substances, it is exported pursuant to such export permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.

(Pub.L. 91–513, Title III, § 1003, Oct. 27, 1970, 84 Stat. 1286; Pub.L. 95–633, Title I, § 106, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98–473, Title II, § 522, Oct. 12, 1984, 98 Stat. 2076.)

References in Text. Schedules I, II, III, IV, and V, referred to in text, are set out in section 812(c) of this title.

§ 954. Transshipment and in-transit shipment of controlled substances

Notwithstanding sections 952, 953, and 957 of this title—

(1) A controlled substance in schedule I may—

(A) be imported into the United States for transshipment to another country, or

(B) be transferred or transshipped from one vessel, vehicle, or aircraft to another vessel, vehicle, or aircraft within the United States for immediate exportation,

if and only if it is so imported, transferred, or transshipped (i) for scientific, medical, or other legitimate purposes in the country of destination, and (ii) with the prior written approval of the Attorney General (which shall be granted or denied within 21 days of the request).

(2) A controlled substance in schedule II, III, or IV may be so imported, transferred, or transshipped if and only if advance notice is given to the Attorney General in accordance with regulations of the Attorney General.

(Pub.L. 91-513, Title III, § 1004, Oct. 27, 1970, 84 Stat. 1287.)

References in Text. Schedules I, II, III, and IV, referred to in text, are set out in section 812(c) of this title.

§ 955. Possession on board vessels, etc., arriving in or departing from United States

It shall be unlawful for any person to bring or possess on board any vessel or aircraft, or on board any vehicle of a carrier, arriving in or departing from the United States or the customs territory of the United States, a controlled substance in schedule I or II or a narcotic drug in schedule III or IV, unless such substance or drug is a part of the cargo entered in the manifest or part of the official supplies of the vessel, aircraft, or vehicle.

(Pub.L. 91-513, Title III, § 1005, Oct. 27, 1970, 84 Stat. 1287.)

References in Text. Schedules I, II, III, and IV, referred to in text, are set out in section 812(c) of this title.

§ 955a. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels

Vessels of United States or vessels subject to jurisdiction of United States on high seas

(a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Citizens of United States

(b) It is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Vessels within customs waters of United States

(c) It is unlawful for any person on board any vessel within the customs waters of the United States to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Intent or knowledge of unlawful importation into United States

(d) It is unlawful for any person to possess, manufacture, or distribute a controlled substance—

(1) intending that it be unlawfully imported into the United States; or

(2) knowing that it will be unlawfully imported into the United States.

Exceptions; burden of proof

(e) Subsections (a), (b), and (c) of this section do not apply to a common or contract carrier, or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States, or any person on board such a vessel who possesses or distributes a controlled substance in the lawful course of his duties, if the controlled substance is a part of the cargo entered in the vessel's manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. It shall not be necessary for the United States to negative the exception set forth in this subsection in any complaint, information, indictment, or other pleading or in any trial or other proceeding. The burden of going forward with the evidence with respect to this exception is upon the person claiming its benefit.

Jurisdiction and venue

(f) Any person who violates this section shall be tried in the United States district court at the point of entry where that person enters the United States, or in the United States District Court for the District of Columbia.

Penalties

(g)(1) Any person who commits an offense defined in subsection (a), (b), (c) or (d) of this section shall be punished in accordance with the penalties set forth in section 960 of this title.

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under sections 955a to 955d of this title shall be punished in accordance with the penalties set forth in section 962 of this title if such offense is a second or subsequent offense as defined in section 962(b) of this title.

Extension beyond territorial jurisdiction of United States

(h) This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

(Pub. L. 96–350, § 1, Sept. 15, 1980, 94 Stat. 1159.)

§ 955b. Definitions

As used in sections 955a to 955d of this title—

(a) "Customs waters" means those waters as defined in section 1401(j) of Title 19.

(b) "High seas" means all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation.

(c) "Vessel of the United States" means any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended, or owned in whole or in part by the United States or a citizen of the United States, or a corporation created under the laws of the United States, or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention on the High Seas, 1958.

(d) "Vessel subject to the jurisdiction of the United States" includes a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958.

(e) "Comprehensive Act" means the Comprehensive Drug Abuse Control and Prevention Act of 1970. All terms used in sections 955a to 955d of this title that are defined in the Comprehensive Act have the meanings assigned to them by that Act.

(Pub. L. 96–350, § 2, Sept. 15, 1980, 94 Stat. 1160.)

References in Text. The Federal Boat Safety Act of 1971, as amended, referred to in subsec. (c), is Pub. L. 92–75, Aug. 10, 1971, 85 Stat. 213, which was classified principally to chapter 33 (section 1451 et seq.) of Title 46, Shipping, and was repealed by Pub.L. 98–89, § 4(b), Aug. 26, 1983, 97 Stat. 605. See section 13101 of Title 46.

The Convention on the High Seas, 1958, referred to in subsecs. (c) and (d), is not classified to the U.S.C.A.

The Comprehensive Drug Abuse Control and Prevention Act of 1970, referred to in subsec. (e), probably means the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1242, which is classified principally to this chapter (section 801 et seq. of this title). For complete classification of this Act to the U.S.C.A., see U.S.C.A. Tables volume.

§ 955c. Attempt or conspiracy

Any person who attempts or conspires to commit any offense defined in sections 955a to 955d of this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 96–350, § 3, Sept. 15, 1980, 94 Stat. 1160.)

§ 955d. Seizure or forfeiture of property

Any property described in section 881(a) of this title that is used or intended for use to commit, or to facilitate the commission of, an offense under sections 955a to 955d of this title shall be subject to seizure and forfeiture in the same manner as similar property seized or forfeited under section 881 of this title.

(Pub. L. 96–350, § 4, Sept. 15, 1980, 94 Stat. 1160.)

§ 956. Exemption authority

(a) The Attorney General may by regulation exempt from sections 952(a) and (b), 953, 954, and 955 of this title any individual who has a controlled substance (except a substance in schedule I) in his possession for his personal medical use, or for administration to an animal accompanying him, if he lawfully obtained such substance and he makes such declaration (or gives such other notification) as the Attorney General may by regulation require.

(b) The Attorney General may by regulation except any compound, mixture, or preparation containing any depressant or stimulant substance listed in paragraph (a) or (b) of schedule III or in schedule IV or V from the application of all or any part of this subchapter if (1) the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system, and (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system.

(Pub. L. 91–513, Title III, § 1006, Oct. 27, 1970, 84 Stat. 1288.)

References in Text. Schedules I, III, IV, and V, referred to in text, are set out in section 812(c) of this title.

§ 957. Persons required to register

(a) No person may—

(1) import into the customs territory of the United States from any place outside thereof (but within the United States), or import into the United States from any place outside thereof, any controlled substance, or

(2) export from the United States any controlled substance in schedule I, II, III, IV, or V,

unless there is in effect with respect to such person a registration issued by the Attorney General under section 958 of this title, or unless such person is exempt from registration under subsection (b) of this section.

(b)(1) The following persons shall not be required to register under the provisions of this section and may lawfully possess a controlled substance:

(A) An agent or an employee of any importer or exporter registered under section 958 of this title if such agent or employee is acting in the usual course of his business or employment.

(B) A common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of his business or employment.

(C) An ultimate user who possesses such substance for a purpose specified in section 802(25) of this title and in conformity with an exemption granted under section 956(a) of this title.

(2) The Attorney General may, by regulation, waive the requirement for registration of certain importers and exporters if he finds it consistent with the public health and safety; and may authorize any such importer or exporter to possess controlled substances for purposes of importation and exportation.

(Pub. L. 91–513, Title III, § 1007, Oct. 27, 1970, 84 Stat. 1288; Pub.L. 98–473, Title II, § 523, Oct. 12, 1984, 98 Stat. 2076.)

References in Text. Schedules I, II, III, and IV, referred to in subsec. (a)(2), are set out in section 812(c) of this title.

§ 958. Registration requirements

Applicants to import or export controlled substances in schedule I or II

(a) The Attorney General shall register an applicant to import or export a controlled substance in schedule I or II if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. In determining the public interest, the factors enumerated in paragraph (1) through (6) of section 823(a) of this title shall be considered.

Activity limited to specified substances

(b) Registration granted under this section shall not entitle a registrant to import or export controlled substances other than specified in the registration.

Applicants to import controlled substances in schedule III, IV, or V or to export controlled substances in schedule III or IV

(c) The Attorney General shall register an applicant to import a controlled substance in schedule III, IV, or V or to export a controlled substance in schedule III or IV, unless he determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the factors enumerated in paragraphs (1) through (6) of section 823(d) of this title shall be considered.

Denial of application for registration; revocation or suspension of registration; seizure of controlled substances

(d)(1) The Attorney General may deny an application for registration under subsection (a) of this section if he is unable to determine that such registration is consistent with the public interest (as defined in subsection (a) of this section) and with the United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part.

(2) The Attorney General may deny an application for registration under subsection (c) of this section, or revoke or suspend a registration under subsection (a) or (c) of this section, if he determines that such registration is inconsistent with the public interest (as defined in subsection (a) or (c) of this section) or with the United States obligations under international treaties, conventions, or protocols in effect on October 12, 1984.

(3) The Attorney General may limit the revocation or suspension of a registration to the particular controlled substance, or substances, with respect to which grounds for revocation or suspension exist.

(4) Before taking action pursuant to this subsection, the Attorney General shall serve upon the applicant or registrant an order to show cause as to why the registration should not be denied, revoked, or suspended. The order to show cause shall contain a statement of the basis thereof and shall call upon the applicant or registrant to appear before the Attorney General, or his designee, at a time and place stated in the order, but in no event less than thirty days after the date of receipt of the order. Proceedings to deny, revoke, or suspend shall be conducted pursuant to this subsection in accordance with subchapter II of chapter 5 of Title 5. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this subchapter or any other law of the United States.

(5) The Attorney General may, in his discretion, suspend any registration simultaneously with the institution of proceedings under this subsection, in cases where he finds that there is an imminent danger to the public health and safety. Such suspension shall continue in effect until the conclusion of such proceedings, including judicial review thereof, unless sooner withdrawn by the Attorney General or dissolved by a court of competent jurisdiction.

(6) In the event that the Attorney General suspends or revokes a registration granted under this section, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the Attorney General, be seized or placed under seal. No disposition may be made of any controlled substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded, except that a court, upon application therefor, may at any time order the sale of perishable controlled substances. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances (or proceeds of the sale thereof which have been deposited with the court) shall be forfeited to the United States; and the Attorney General shall dispose of such controlled substances in accordance with section 881(e) of this title.

Registration period

(e) No registration shall be issued under this subchapter for a period in excess of one year. Unless the regulations of the Attorney General otherwise provide, section 822(f), 825, and 827 of this title shall apply to persons registered under this section to the same extent such sections apply to persons registered under section 823 of this title.

Rules and regulations

(f) The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration of importers and exporters of controlled substances under this section.

Scope of authorized activity

(g) Persons registered by the Attorney General under this section to import or export controlled substances may import or export (and, for the purpose of so importing or exporting, may possess) such substances to the extent authorized by their registration and in conformity with the other provisions of this subchapter and subchapter I of this chapter.

Separate registrations for each principal place of business

(h) A separate registration shall be required at each principal place of business where the applicant imports or exports controlled substances.

Emergency situations

(i) Except in emergency situations as described in section 952(a)(2)(A) of this title, prior to issuing a registration under this section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under section 952(a) of this title authorizing the importation of such a substance, the Attorney General shall give manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

(Pub. L. 91–513, Title III, § 1008, Oct. 27, 1970, 84 Stat. 1289; Pub.L. 98–473, Title II, §§ 524, 525, Oct. 12, 1984, 98 Stat. 2076.)

References in Text. Schedules I, II, III, IV, and V, referred to in subsecs. (a), (b), (c), and (h), are set out in section 812(c) of this title.

This subchapter, referred to in subsec. (f), was in the original "this title" meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 959. Manufacture or distribution for purposes of unlawful importation

It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II—

(1) intending that such substance will be unlawfully imported into the United States; or

(2) knowing that such substance will be unlawfully imported into the United States.

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.

(Pub. L. 91–513, Title III, § 1009, Oct. 27, 1970, 84 Stat. 1289.)

References in Text. Schedules I and II, referred to in text, are set out in section 812(c) of this title.

§ 960. Prohibited acts A

Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Penalties

(b)(1) In the case of a violation under subsection (a) of this section involving—

(A) 100 grams or more of a mixture or substance containing a detectable amount of a narcotic drug in schedule I or II other than a narcotic drug consisting of—

(i) coca leaves;

(ii) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(iii) a substance chemically identical thereto;

(B) a kilogram or more of any other narcotic drug in schedule I or II;

(C) 500 grams or more of phencyclidine (PCP);

(D) 5 grams or more of lysergic acid diethylamide (LSD);

the person committing such violation shall be imprisoned for not more than twenty years, or fined not more than $250,000, or both.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3), be imprisoned not more than fifteen years, or fined not more than $125,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(3) In the case of a violation under subsection (a) of this section with respect to less than 50 kilograms of marihuana, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V, the person committing such violation shall, except as provided in paragraph (4) be imprisoned not more than five years, or be fined not more than $50,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

(Pub. L. 91-513, Title III, § 1010, Oct. 27, 1970, 84 Stat. 1290; Pub.L. 98-473, Title II, § 504, Oct. 12, 1984, 98 Stat. 2070.)

Amendment of Subsecs. (b) and (c)

Pub.L. 98-473, Title II, c. II, §§ 225(a), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, this section is amended:

(1) in subsection (b)(1) [redesignated (b)(2) by Pub.L. 98-473, Title II, § 504(1)], by deleting the last sentence;

(2) in subsection (b)(2) [redesignated (b)(3) by Pub.L. 98-473, Title II, § 504(1)], by deleting the last sentence; and

(3) by repealing subsection (c).

References in Text. Schedules I, II, III, and IV, referred to in subsec. (b), are set out in section 812(c) of this title.

§ 961. Prohibited acts B

Any person who violates section 954 of this title shall be subject to the following penalties:

(1) Except as provided in paragraph (2), any such person shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. Sections 842(c)(1) and (c)(3) of this title shall apply to any civil penalty assessed under this paragraph.

(2) If such a violation is prosecuted by an information or indictment which alleges that the violation was committed knowingly or intentionally and the trier of fact specifically finds that the violation was so committed, such person shall be sentenced to imprisonment for not more than one year or a fine of not more than $25,000 or both.

(Pub. L. 91-513, Title III, § 1011, Oct. 27, 1970, 84 Stat. 1290.)

§ 962. Second or subsequent offenses

(a) Any person convicted of any offense under this subchapter is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that otherwise authorized, by twice the fine otherwise authorized, or by both. If the conviction is for an offense punishable under section 960(b) of this title, and if it is the offender's second or subsequent offense, the court shall impose, in addition to any term of imprisonment and fine, twice the special parole term otherwise authorized.

(b) For purposes of this section, a person shall be considered convicted of a second or subsequent offense if, prior to the commission of such offense, one or more prior convictions of him for a felony under any provision of this subchapter or subchapter I of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant drugs, have become final.

(c) Section 851 of this title shall apply with respect to any proceeding to sentence a person under this section.

(Pub. L. 91–513, Title III, § 1012, Oct. 27, 1970, 84 Stat. 1290; Pub.L. 98–473, Title II, § 505, Oct. 12, 1984, 98 Stat. 2070.)

Amendment of Subsec. (a)

Pub.L. 98–473, Title II, §§ 225(b), 235, Oct. 12, 1984, 98 Stat. 2030, 2031, provided that, effective Nov. 1, 1986, subsec. (a) of this section is amended by deleting the last sentence.

References in Text. "This subchapter", referred to in subsec. (b), was in the original "this title" meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91–513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.)

References in Text. This subchapter, referred to in text, was in the original "this title" meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 964. Additional penalties

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(Pub. L. 91–513, Title III, § 1014, Oct. 27, 1970, 84 Stat. 1291.)

References in Text. This subchapter referred to in text, was in the original "this title" meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1102 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 965. Applicability of Part E of Subchapter I

Part E of subchapter I of this chapter shall apply with respect to functions of the Attorney General (and of officers and employees of the Bureau of Narcotics and Dangerous Drugs) under this subchapter, to administrative and judicial proceedings under this subchapter, and to violations of this subchapter, to the same extent that such part applies to functions of the Attorney General (and such officers and employees) under subchapter I of this chapter, to such proceedings under subchapter I of this chapter, and to violations of subchapter I of this chapter. For purposes of the application of this section to section 880 or 881 of this title, any reference in such section 880 or 881 of this title to "this subchapter" shall be deemed to be a reference to this subchapter, any reference to section 823 of this title shall be deemed to be a reference to section 958 of this title, and any reference to section 822(d) of this title shall be deemed to be a reference to section 957(b)(2) of this title.

(Pub. L. 91–513, Title III, § 1015, Oct. 27, 1970, 84 Stat. 1291; Pub. L. 95–633, Title III, § 301(b), Nov. 10, 1978, 92 Stat. 3778.)

References in Text. This subchapter referred to in text, was in the original "this title" meaning Title III of Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

§ 966. Authority of Secretary of the Treasury

Nothing in this chapter shall derogate from the authority of the Secretary of the Treasury under the customs and related laws.

(Pub. L. 91–513, Title III, § 1016, Oct. 27, 1970, 84 Stat. 1291.)

References in Text. This chapter, referred to in text, was, in the original, this Act, meaning Pub. L. 91–513, Oct. 27, 1970, 84 Stat. 1236, the Drug Abuse Prevention and Control Act of 1970.

The customs laws, referred to in text, are classified generally to Title 19, U.S.C.A., Customs Duties.

§ 967. Smuggling of controlled substances; investigations; oaths; subpenas; witnesses; evidence; production of records; territorial limits; fees and mileage of witnesses

For the purpose of any investigation which, in the opinion of the Secretary of the Treasury, is necessary and proper to the enforcement of section 545 of Title 18 (relating to smuggling goods into the United States) with respect to any controlled substance (as defined in section 802 of this title), the Secretary of the Treasury may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of records (including books, papers, documents, and tangible things which constitute or contain evidence) relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place within the customs territory of the United States, except that a witness shall not be required to appear at any hearing distant more than 100 miles from the place where he was served with subpena. Witnesses summoned by the Secretary shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Oaths and affirmations may be made at any place subject to the jurisdiction of the United States.

(Aug. 11, 1955, c. 800, § 1, 69 Stat. 684; Oct. 27, 1970, Pub.L. 91–513, Title III, § 1102(t), 84 Stat. 1294.)

Codification. This section was formerly classified to section 1034 of Title 31 prior to the general revision and enactment of Title 31, Money and Finance, by Pub.L. 97–258, § 1, Sept. 13, 1982, 96 Stat. 877.

Section was also formerly classified to section 198a of this title.

Section was not enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1236) which comprises this chapter.

Effective Date of 1970 Amendment. Amendment by Pub.L. 91–513 effective the first day of the seventh calendar month that begins after Oct. 26, 1970, see section 1105(a) of Pub.L. 91–513.

Savings Provisions. Prosecutions for any violation of law occurring, and civil seizures or forfeitures and injunctive proceedings commenced, prior to the effective date of amendment of this section by section 1102 of Pub.L. 91–513, not to be affected or abated by reason thereof, see section 1103 of Pub.L. 91–513.

§ 968. Service of subpena; proof of service

A subpena of the Secretary of the Treasury may be served by any person designated in the subpena to serve it. Service upon a natural person may be made by personal delivery of the subpena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpena to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpena entered on a true copy thereof by the person serving it shall be proof of service.

(Aug. 11, 1955, c. 800, § 2, 69 Stat. 685.)

Codification. This section was formerly classified to section 1035 of Title 31 prior to the general revision and enactment of Title 31, Money and Finance, by Pub.L. 97–258, § 1, Sept. 13, 1982, 96 Stat. 877.

Section was also formerly classified to section 198b of this title.

Section was not enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1236) which comprises this chapter.

§ 969. Contempt proceedings

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Secretary of the Treasury may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpenaed person is an inhabitant, carries on business or may be found, to compel compliance with the subpena of the Secretary of the Treasury. The court may issue an order requiring the subpenaed person to appear before the Secretary of the Treasury there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district whereof the subpenaed person is an inhabitant or wherever he may be found.

(Aug. 11, 1955, c. 800, § 3, 69 Stat. 685.)

Codification. This section was formerly classified to section 1036 of Title 31 prior to the general revision and enactment of Title 31, Money and Finance, by Pub.L. 97–258, § 1, Sept. 13, 1982, 96 Stat. 877.

Section was also formerly classified to section 198c of this title.

Section was not enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1236) which comprises this chapter.

§ 970. Criminal forfeitures

Section 853 of this title, relating to criminal forfeitures, shall apply in every respect to a violation of this subchapter punishable by imprisonment for more than one year.

(Pub.L. 91–513, Title III, § 1017, as added Pub.L. 98–473, Title II, § 307, Oct. 12, 1984, 98 Stat. 2051.)

References in Text. This subchapter, referred to in text, was in the original "this title" meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1101 to 1105 of Pub.L. 91–513, see U.S.C.A. Tables volume.

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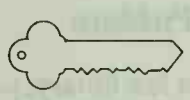

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